

App. F. IX-4

1927-8

File No. 54/1)

Previous References

(CB

Serial No. 1

Later References

CB 231-27-1 (Conf)
CB 15-30-1 (Conf)
CB 177-30-143 (Conf)

Preserve

General and Revenue Secretariat.

Serial No. 1

Part B for ~~Dec~~ Sept. 1911

SUBJECT

Designation of Mr. B. Nagappa
Bar-at-law, as Legal Remembrancer
& Secretary, Law Department

To The Compiler, Mysore Gazette
No. 1867 of 26/8/11)

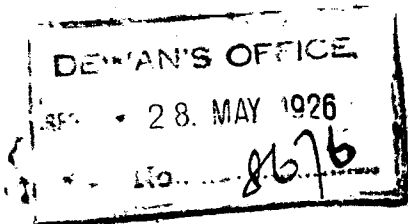
Notifies the designation of Mr. B.
Nagappa Bar-at-law as Legal
Remembrancer & Secretary, Law
Department.

CB 492

WD 01264—GPB—40,000 17-12-25

[App. F. III—2

Serial
No.



A note on Re Legal Remembrance
is Submitted.

Dewan.

B.A.
21.6.26

It is with me.

M.
27.5.26

The question of designating Mr
Nagappa "Legal Remembrances and
Secy. Legislative Dept" will if approved
be brought up at a meeting of the Council

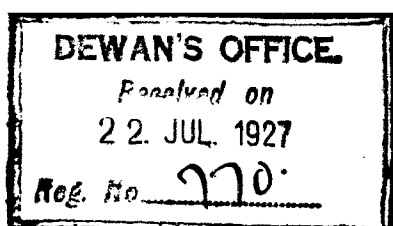
Dewan)

new
21/7

8/2
M.
21.7.27

C.B.
new
21/7

CS
24/7/27



2

Extract from the Proceedings of the..... 805th Meeting of the Council of His
Highness the Maharaja, held at Bangalore on the..... 13th August 1927..... 19

13. Subject. - Clause v of the schedule.

Question of designation of Mr. B.Nagappa, Bar-at-Law, as
"Legal Remembrancer and Secretary, Legislative Department".

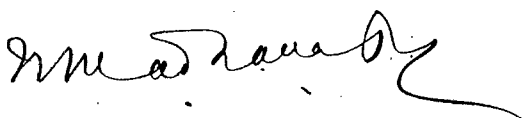
OPINION OF THE COUNCIL.

Mr. Nagappa may be given the designation "Legal
Remembrancer and Secretary, Law Department" - his duties
remaining the same as at present.

(Signed) Mirza M. Ismail,

Dewan of Mysore.

"EXTRACT"



Chief Secretary to Government.

(For Disposal at a Meeting)

(2)
No. C. 28

9. 1927-28

GENERAL AND REVENUE SECRETARIAT.

Council Matter.

SUBJECT

(clause V of the schedule)

Question of designating Mr. B. Nagappa, Bar-at-Law,
"Legal Remembrancer and Secretary, Legislative Department"

CIRCULATED TO THE MEMBERS OF COUNCIL.

By Order,

M. A. Chavara
Chief Secretary to Government.

22nd July 1927.

752
23/7 First Member of Council.

102
23/7/27

537
23/7 Second Member of Council.

100
24.7.27.

643
26/7 Third Member of Council.

108
26/7/27

Submitted to His Highness.

In March 1924, the Law Department was re-organized, defining the responsibilities of the several Departmental Officers in regard to the conduct of the legal affairs of Government and entrusting the Secretary to Government, Law Department, with the duty of advising Government on all legal questions, superintending and advising on the conduct of all litigation in which Government is interested, making suitable arrangements for the conduct of suits, etc.

2. Mr. Nagappa, who has been holding this office, has often represented that his pay and status should be raised and that he should be designated "Legal Remembrancer", this being the designation given to officers entrusted with similar duties in some Provinces of British India.

3. The pay of Mr. B. Nagappa has recently been enhanced to Rs.1,400/-, and the Council are of opinion that his designation may be changed to "Legal Remembrancer and Secretary, Law Department", his duties remaining the same as at present.

4. The above proposal may be graciously approved.

Mirza A. Ismail

Bangalore.

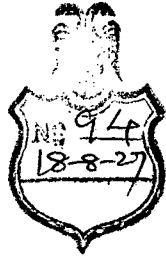
18th August 1927.

Page 2 of
Office Notes

B

Record of Cases submitted for the Orders
of His Highness the Maharaja.

Subject.



Designation of Mr. B. Nagappa
as Legal Remembrancer and Secretary,
Law Department.

104

Order.

KRUP

20/8/27

C. Sear

Mo

21-8-27

*mu
22/8*

SUBJECT

Designation of Mr. B.
Nagappa, Bar-at-Law, as Legal
Remembrancer, and Secy to Govt
Law Dept.

Dr. M. J. M. also subd.

24/8/27

Issue
no. 2578

(*)

31. All urgent or confidential files returned with His Highness' orders may, in the absence of instructions or indications to the contrary, be ordinarily circulated to the Members of Council for perusal after the issue of orders.

33. The Secretaries concerned should see that orders in the cases referred to above are issued at once and that the files are returned immediately after to the Chief Secretary for circulation to the Members.

34. In all other cases, the files will first be circulated to the Members of Council at headquarters and then sent to the Secretariat concerned for the issue of orders.

Circulated to Members of Council for perusal of His

Highness' orders before /after issue of orders. (Vide Rules 31, 33

and 34 of the Subsidiary Rules for the conduct of business of Council in the

Manual of Council Rules and Procedure.)

By Order,

M. A. Rama Rao
Chief Secretary to Government.

Through the Secretary to Government,

.....Department.

1586
23/8

FIRST MEMBER OF COUNCIL. *lee*

22/10/27

SECOND MEMBER OF COUNCIL. *Mull*

24.5.27

Mird
EXTRA MEMBER OF COUNCIL.

esx
25/8

1537
22/8

General and Revenue
Secretariat.

CP File No. 524 of 1927.

Serial
No.

1. Not. No. 1867 of 26/8/27
designating Mr. B. Nagappa
as "Legal Remembrancer and
Secy. to Govt. Law Dept.
To the Compiler.
Copy to Mr. Nagappa, Compiler
and Proli. Prt.

B2.

NOTE—Contn. sheet

NOTE RE: REMEMBRANCER OF LEGAL AFFAIRS.

It has been the practice in civilized countries and in British India to organise the Law Department with a view to make the head of the Department responsible to the Government for the conduct of its legal affairs. A separate Law Department and the Office of the Legal Remembrancer exists in the Provinces of Bengal, Bihar and Orissa, Bombay, United Provinces, Punjab, Burma and Assam. The Legal Remembrancer is the Chief Law Officer of the Crown in those provinces. The main duties of such an officer are:--

(a) to superintend and advise on the conduct of all litigation in which Government or its officers are concerned,

(b) to give opinions on statutory rules and orders to be issued by the Executive Department,

(c) to advise on the construction of statutes or regulations,

(d) to advise Government on all legal questions in connection with the administration of public affairs or arising out of the acts of Government officers or public servants,

His duty is to advise Government on all proposals of appeal under Section 417 of Criminal Procedure Code. It is his duty to draft bills embodying the proposal for legislation as approved by Government and is bound also to bring to the notice of Government all new enactments which require the issue by Government of rules, orders, bye-laws or other notifications. He has to supervise the work of the Law Officers or the conduct of Civil or Criminal Cases. He has to tender opinions to the Heads of Departments. In fact he is responsible

Government for the conduct of all litigation affecting Government and to see that monies due to Government are realised by timely execution of decrees.

The Law Department was reorganised in March 1924. The reasons for reorganising the Law Department are stated in the Government Order dated 19th March 1924 (Flag I) and the Submission Note to His Highness (Flag Z) in the file below. The reasons given are:--

First, the rules that were in force before reorganisation have not fixed any responsibility for the conduct of legal affairs on any single officer nor did they prescribe any returns for the Law Officers showing the progress in regard to Government cases conducted by them and the execution of decrees obtained by Government with the result that litigation in which Government were interested was not receiving the adequate attention to protect Government interests.

Secondly, with the promulgation of the Regulation, providing for suits against Government, the number of suits to be defended by Government will increase and adequate protection of the interest of Government was rendered necessary. The responsibilities were fixed upon the Departmental officers and the Chief Law Officer of Government was entrusted with the task of advising Government on all legal questions connected with the administration of public affairs &c. While creating the Law Department the rules were framed for the conduct of the legal affairs of Government (Flag K). These rules have been framed on the model of Bombay Rules constituting the Local and Legislative Secretary as the Chief Law Officer of Government (Vide Flag X, Submission Note). The rules imposed duties mentioned in para 1 supra which are ordinarily performed by the Head of the Law Department i.e., the Legal Remembrancer.

The following items of work were performed by the Secretary to Government Local and Legislative Departments after the rules came into force.

(1) 16 Bills were drafted and scrutinised in the Law Department since 1924 and 11 Bills which have been drafted are now pending disposal before the Houses.

(2) Many of the proposals of the Chief Court have been scrutinised and over-ruled in the following cases:--

(a) In re: the power to transfer Munsiffs delegated to the Chief Court by Government:--

This power was delegated to the Chief Court about the year 1917. It was pointed out to Government by the Secretary Local and Legislative Departments that the Government had not been invested with the power by the Chief Court Regulation to delegate their power to the Chief Court and that the exercise of such power was ultra vires and illegal. This view was finally accepted by Government after hearing the Chief Court and in consequence the Government had to withdraw the power from the Chief Court.

(b) The proposals to delegate the power of passing decrees in small cause suits to Sheristadars of Courts and some judicial powers to the Registrar of Chief Court and the power of ~~transferring~~ transferring magistrates have all been shown to be ultra vires and over-ruled.

(c) In capital cases the judgments of the Chief Court were scrutinised and in important cases their view was not accepted by Government with the result that the sentence of death passed upon condemned prisoners were commuted to transportation for life. Similarly several proposals of Chief Court had to be modified.

Framing of rules.--The Arms Rules, the Cin

Rules have been framed, besides scrutinising the various rules sent to the Law Department by the Financial Secretariat and other Secretariats.

Opinion work.--Many opinions on important questions of law involving heavy sums of money were given. Prominent among these may be mentioned the following:--

(a) In re: Income-tax to be levied from Messrs. John Taylor & Sons:--The Chief Court decided against Government. The Secretary, Local and Legislative Departments have opinion that the Chief Court decision on the question of law was erroneous. This opinion has been held to be correct by the Full Bench of Calcutta and also by the Full Bench of Rangoon in a recent case. In accordance with the opinion of the Secretary, income-tax has been levied by the Deputy Commissioner, Kolar for this year. (Flag R. contains my latter opinion).

(b) An interesting question was raised by the Secretary, Local and Legislative Departments re; income to be paid on nearly 10 to 12 lakhs of rupees being the royalty due to Government. The opinion expressed by the Local and Legislative Secretary was approved by the Advocate General of Madras and Mr. Alladi Krishnaswami Iyer to whom the question was referred for opinion. The test case has been argued by Mr. Alladi Krishnaswami Iyer before the Chief Court some three months ago and the judgment is expected. (Flag Q contains my opinion and Flag S contains Mr. Alladi Krishnaswami Iyer's and Flag T contains the opinion of Advocate General)

(c) In re: Monopolies:--The Secretary expressed an opinion that the grant of monopolies to companies working for Chrome Manganese ore in the State Co., was illegal and ultra vires. This opinion led to the change in the previous opinion

of the Government (Flag R contains the opinion).

(d) In re: surcharge levied on goods carried from State railways by the Government of India in 1917.--In this case the Secretary gave an opinion that in as much as the sovereign rights of His Highness the Maharaja in the internal administration of State are in tact and as this taxation is incidental to such sovereign right, the Government of India had no right to usurp this right and tax the goods carried by the State Railways in Mysore under Freight Tax Act of 1919 and credit the amount to their Treasury and as such they are to refund the amount so levied over the goods carried in Mysore State Railways. This question which involves a sum of more than a lakh of rupees is pending between the Mysore State and the Government of India. This point is urged in accordance with the above opinion.

(e) Internal Security Scheme.--The intricate questions that arise when Martial Law has to be proclaimed have been dealt with and this question is pending.

(f) In important cases many threatened suits have not been filed owing to the crushing replies given to the questions raised by the litigants.

(g) The work of the Government Advocate had to be watched in many important income-tax and super-tax and other cases. It was regrettable that the Excise Commissioner made a reference suo moto in Kaiser-i-Hind Mills case against the opinion of the Secretary who advised the reference to be withdrawn, that the reference was not withdrawn but pressed with the result that the Chief Court decided against Government and that the Government had to lose an income-tax upon 5 lakhs of rupees and profit made by the Company. In consequence of

this, Government ordered that all future reference by the Commissioner of Income-tax should be scrutinised and approved by the Secretary to Government, Local and Legislative Departments.

(h) Opinions have been tendered in very many important references from the Comptroller, Revenue Commissioner, Muzrai Commissioner and other Heads of Departments.

(1) From the returns submitted quarterly it will be seen that the Government are interested in suits involving several thousands of rupees and the decrees obtained have not been properly executed. Various instructions have to be given to see to the realisation of the money and to watch the interest of Government from stage to stage in the litigation. It will thus be seen that with the Re-organisation of the Law Department the interests of Government have been zealously safeguarded.

There were three Secretaries to Government in October 1923 namely, the Chief Secretary, General Secretary and Revenue Secretary. I was appointed to hold the office of the General Secretary and in doing so the name of the General Secretary was changed to Local and Legislative Secretary and I was given the work that was being done by the General Secretary in addition to legal work. I was given my grade pay plus Rs.150 duty allowance as is always given to an officer appointed as Secretary to Government. When the Law Department was re-organised and the Secretary was entrusted with the duties of the Legal Remembrancer in March 1924 no extra remuneration was given to the Head of the Law Department. The pay and status of the Legal Remembrancer as such is given in the list attached to this note. It will be seen therefrom that the

officer gets a decent sum as his salary, ranging from Rs.4,100 to 1800 in different provinces.

The Legal Remembrancer as the Head of the Law Department.--Though the Secretary Local and Legislative Departments is made the Chief Law Officer of Government (Vide Submission Note) and entrusted with the duties of the Legal Remembrancer his designation has not been changed and no extra salary fixed to such additional work. From the rules it is clear that the Secretary tenders his opinion and deals directly with the Heads of Departments in all legal matters. This is generally done by the Legal Remembrancer as Head of the Department and the Secretary doing this work seems to be anomalous. This question was in a manner raised by the Members of the Legislative Council. This policy was criticised (Vide discussions in the Budget Session of June 1924 pages 36 to 39). The discussions show that they object to the Secretary, a subordinate officer of Government giving advice and exercising control over the legal officers in the conduct of legal affairs of Government. At page 41 Mr. D.Venkatesiah stated as follows:--

"I have the highest regard for the present incumbent and believe that he is the fittest person to occupy the place he occupies"

While saying this his objection seems to be that the Secretary to Government should not perform the same functions as that of a Legal Remembrancer. The Government Advocate also took similar objection and did not take instructions in several important cases unless he was directed to do so by the late First Member. Nowhere in British India the duties performed by the officer as the Head of the Law Department are entrusted to the Secretary to Government as such. There are some statutory duties

imposed upon the Head of the Law Department in other places for instance the Legal Remembrancer in - - - Central Provinces is authorised to act for Governor in all Judicial Proceedings in Civil Courts and is the recognised agent of Government under Rule 2 Order 27 Schedule (1) and he is the officer authorised to exercise powers conferred by Section 93 of the Civil Procedure Code 1908 with regard to suits relating to matters specified in Sections 91 and 92 (idem). As he has to exercise control over the entire business of the Law Department it is anomalous to call him a Secretary. By appointing him as the Head of Law Department namely the Legal Remembrancer with suitable pay he will have the status to bring forward Bills and pilot the same before the Houses. There are now important Bills which involve purely questions of law that are to be passed by the Legislature, for instance the Code of Criminal Procedure, Income-Tax Regulation &c., that are pending now. In the Code of Criminal Procedure several conflicting decisions have been passed by various High Courts. It is necessary to appreciate the different views given by several High Courts and to adopt such of those as will suit the conditions in Mysore. This Bill requires a very careful handling both in the Select Committee stage and in the second reading of it. Such Bills can be safely entrusted to the Head of the Law Department.

Secondly there is another important direction in which the Legal Remembrancer can assist Government if so desired. In the September Session of 1925 a resolution was brought forward to the effect that a Judge of the Chief Court should be associated with the Member of Government in disposing of revenue appeals that are preferred to Government. The trend of the discussion over this resolution was

that a recommendation to Government was made to associate a Judicial Officer of high standing along with the members of Government in the disposal of complicated questions relating to Revenue Law and that the Resolution was passed opposed on the ground that it was unconstitutional to associate a Judge of the Chief Court with the members of the Executive Council. The object of this Resolution in the words of Mr. Ramachandra Rao was "to see that the administration of justice in revenue matters is rendered more satisfactory than it is now." It was pointed out by the other members that this object can be achieved if a Judicial officer of high standing is associated with Government in the disposal of appeals. It was also suggested that a Legal Remembrancer might be associated with the Member of Government (Vide pages 416, 417 and 418 in the Proceedings of the September Session of 1925) Flag.

I humbly submit for consideration that if the status of Legal Remembrancer is suitably raised the Government can with advantage make use of his services in the directions indicated above.

LIST SHOWING THE PAY DRAWN BY THE LEGAL REMEMBRANCERS IN
DIFFERENT PROVINCES.

.....

Legal Remembrancer Bombay.	Rs.3,000
Government Advocate Burma	Rs.2,000 to Rs.3,000
Legal Remembrancer, Secretary to Government Legislative Department and Secretary Legislative Council.	Rs.1,800
Legal Remembrancer Bihar and Orissa.	Rs.2750
Legal Remembrancer Central Provinces.	Rs.2,550
Legal Remembrancer Bengal.	Rs.4,100

Majr

N. 1867 / C.B. 54-27-1.
Dated 20/8/22

Mr. B. Nagappa, Bar at Law, Secretary
to Govt, Law Dept., with whom he
designated "Legal Remembrancer and
Secy to Govt, Law Dept."

By order
new

W. S. to Govt

To The Comptroller, Mr. G. for order in
his Gazette

1868 C.B. 57 20/8/22 Copy to Mr. B. Nagappa with the
intimation that his duties will remain as at present

alb

B. O

W. S. to Govt.

1869 C.B. 57 20/8/22 Copy to Comptroller. Do. do.

Copy to
25/8.

Copy to Protection Mr. — sent on 20/8/22
22/9/22

S. O.

Government of His Highness the Maharaja of Mysore.

GENERAL AND REVENUE DEPARTMENTS.

G. O. No¹ P. 4966-5045—Cts. 76-23-1, dated 10—19th March 1924.

Conduct of Legal affairs of Government.

Passes orders laying down the procedure for the —.

READ—

Government Order No. 4668—Circular 137, dated the 25th September 1888, prescribing rules for the guidance of officers of Government, when they are sued for acts performed in their official capacity.

2. Government Order No. 1932-85—J. 137 of 02-03, dated the 16th March 1904, defining the duties of the Government Advocate and Public Prosecutors and fixing their fees in the several classes of cases.

ORDER No. P. 4966-5045—Cts. 76-23-1, DATED 10—19TH MARCH 1924.

1. The rules read above were framed so far back as 1888 and 1904, and are found in actual working to be defective in many respects. Responsibility for the institution of suits or appeals, for the setting forth of all material facts in the plaint, written statement or memorandum of appeal, and for the execution of decrees, etc., has not been definitely fixed. Nor are returns prescribed for the law officers to show the progress in regard to Government cases conducted by them. As a result thereof, Government are not in touch with the several stages of suits or proceedings brought against their officers and litigation in which Government are interested has not been receiving the attention necessary to safeguard their interests.

2. With the promulgation of the Regulation, providing for suits against Government in respect of certain reliefs, it has become necessary to take immediate steps for the adequate protection of the interests of Government by reorganising the existing machinery entrusted with the conduct of the legal affairs of Government, defining the duties of the several law officers and the responsibilities of the departmental officers, and prescribing the procedure to be adopted at different stages.

3. For some time past, this question has been engaging the careful attention of Government, and the recent appointment of a Secretary to Government, Local and Legislative Departments was in furtherance of this object. It is now proposed, in the rules appended to this order, to constitute the Local and Legislative Secretary as the Chief Law Officer of the Government entrusted with the task of advising Government on all legal questions connected with the administration of public affairs, drafting of legislative measures and rules thereunder, and superintending and advising on the conduct of all litigation, civil or criminal, to which Government are a party or in which Government are in any way interested. The duties of the Government Advocate, Public Prosecutors, and Government Pleaders are clearly defined both on the civil and on the criminal side. The responsibilities of departmental officers are fixed. Procedure to be adopted at different stages is laid down and returns are prescribed to keep the Government in touch with the progress of suits, appeals, etc.

4. The Government are accordingly pleased to promulgate the rules appended to this order, as rules to be hereafter in force for the conduct of the legal affairs of Government.

B. NAGAPPA,

Secretary to Government,
Local and Legislative Departments.

To The Secretaries to Government.
The Heads of Departments.
The Deputy Commissioners of Districts.
The District Magistrates of Districts.
The Registrar, Chief Court.
The Government Advocate.

Exd.—D, K. M.

*Amended by
G.O. No. P. 4400-657
cb 19-24-5
d. 19.2.24
7C.N.*

*(Amended by
G.O. d. 19.2.24
eps alla
7C.N.)*

RULES FOR THE CONDUCT OF THE LEGAL
AFFAIRS OF GOVERNMENT.

Vide G. O. No. P. 4966-5045—Cts. 76-23-1, dated 10—19th
March 1924.

PART I. •

Law Officers.

1. The Law Officers of the Government are:—

(i) The Secretary to Government, Legislative Department.

(ii) The Government Advocate.

(iii) Public Prosecutors and Government Pleaders.

SECRETARY TO GOVERNMENT LEGISLATIVE DEPARTMENT.

His duties.

2. The Secretary to Government, Legislative Department, is the Chief Law Officer of the Government.

3. It is his duty to give opinions on statutory rules and orders proposed to be issued by any Executive Department and to advise the latter on the construction of statutes or regulations.

4. It is his duty to superintend and advise on the conduct of all litigation, civil or criminal, to which Government is a party or in which Government is in any way interested. He will also advise Government in business, the disposal of which depends upon the application or interpretation of the law.

5. The Secretary to Government, Legislative Department, is bound to advise Government on all legal questions in connection with the administration of public affairs, or arising out of the acts of Government officers or public servants, which may be referred to him by Government. This duty extends to Government business of all kinds and in all departments.

6. It is also the duty of the Secretary to Government, Legislative Department to advise Government, regarding proposals to appeal, under Section 417 of the Code of Criminal Procedure, against the acquittal of accused persons, and regarding proposals to apply to the Chief Court to exercise powers of revision in criminal matters arising in such Courts which District Magistrates are not authorised to refer direct to that court under Section 438 of the Code of Criminal Procedure.

7. In matters connected with Civil Justice, the Secretary to Government, Legislative Department, is ^{will be} responsible for the conduct of all suits, appeals and proceedings affecting Government ^{are made}.

to Govt. to see that suits are arranged

G.O. 07
d. 19.2.25

27.2.25

Amended by-
G.P.
d. 19.2.25

8. (1) In all such matters the Head of the Department concerned will correspond in the first instance with the Secretary to Government, Legislative Department.

(2) Correspondence affecting the actual conduct in court of pending suits, appeals and proceedings may, however, when necessary, be conducted direct with the officer or practitioner conducting the case in court. The latter will supply the Secretary to Government, Legislative Department, with all such information as that officer may deem necessary to enable him to exercise proper supervision over the conduct of the case, or for statistical and other purposes.

9. It is also the duty of the Secretary to Government, Legislative Department, to draft Bills embodying such proposals for legislation as are approved by Government.

10. Bills so drafted will in the first instance be regarded merely as drafts intended to facilitate the further discussion of the proposed measure, if the Government consider it necessary, with the Department concerned or with such persons as the Government may think it desirable to consult.

11. If it should ultimately be determined to proceed to legislation, the draft prepared by the Secretary to Government, Legislative Department, will be returned to him; and it will be his duty to revise the draft, embodying in it all the provisions held to be necessary or desirable, and to finally mould the Bill in the shape in which it should be introduced into the Legislative Council, adding to it, the usual statement of object and reasons.

12. The Secretary to Government, Legislative Department, is bound also to bring to the notice of Government, from time to time, all new enactments which require the issue by Government of rules, orders, bye-laws or notifications. The administrative Department concerned will draft all such rules, orders, bye-laws or notifications, as may be necessary to issue, for the approval of Government, and all rules, orders, bye-laws or notifications which it is at any time proposed to issue in the name of Government in virtue of any power derived from any Legislative enactment, should, where necessary, be forwarded to the Secretary to Government, Legislative Department, in order that he may revise the same before they are issued, with a view to legal precision and correctness.

The Secy, d.d. Dept. may attend courts.
13. ~~He may at any time visit any place for the purpose of~~ *watching*
~~inspecting or supervising the work of the Law Officers or the~~
~~conduct of any civil or criminal litigation on behalf of Govern-~~
~~ment.~~

14. The Government will exercise control over all Law Officers. All references relating to the remuneration, leave, duties or conduct of these Officers except the Secretary and other matters affecting them should be addressed to the Secretary to Government, Legislative Department, who will submit them to the Government for orders.

15. The Chief Secretary to Government on receipt of notice under Section 80 of the Code of Civil Procedure shall forward

the same to the Secretary to Government, Legislative Department, for further action.

16. Heads of Departments should not ordinarily make direct reference to the Secretary to Government, Legislative Department, for any legal or other opinion, but should submit references to Government, who will call for the report of the Secretary to Government, Legislative Department or not, as they deem fit.

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2.19.25

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20.5.25

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20.5.25

17. Municipalities and Local Boards must, as a general rule, be left to defend the legality of their own proceedings, and are not entitled to the advice of the Government Law Officers. But in cases of special importance or difficulty a reference may be made to Government to obtain the opinion or advice of the Secretary to Government, Legislative Department, for the guidance of Municipalities or Local Boards in their proceedings or in the defence of actions which have been brought against them or with which they are threatened.

THE GOVERNMENT ADVOCATE.

A. *Appointment.*

18. (1) The Government Advocate will be appointed by the Government.

(2) The appointment is tenable for three years and the incumbent is not ordinarily entitled to leave or pension. The same person may be reappointed, after expiry of his term.

(3) When the Government Advocate wishes to be absent for short periods on account of private affairs, sickness or such other sufficient cause, he will in communication with Government make such arrangement as may be necessary for the conduct of his duties.

(4) In other cases, the sanction of Government, both to the grant of leave and to the acting arrangements found necessary, should be obtained.

B. *Duties—Criminal Work.*

19. He will represent Government in all appeals and revision cases before the Chief Court, appear in connection with applications made to it for transfer of Criminal Cases, and generally appear before the Chief Court in all Criminal Cases in which Government have to be represented in that Court.

20. He will advise the District Magistrates in regard to the preferring of appeals against orders of acquittals.

21. He will also under special orders of Government appear in criminal cases before any other court.

C. *Civil Work.*

22. He will appear before the Chief Court in all Civil and Miscellaneous cases in which Government have to be represented in that Court.

23. He will, if so directed, represent Government in references under the Mysore Stamp Regulation 1900, the Income-tax Regulation, the Land Revenue Code and in other analogous references, and when specially required, in cases under the Legal Practitioners Regulation.

24. He will also, if so directed, represent Government in all original and appellate Civil proceedings in which Government may be a party, before any Court other than the Chief Court.

25. He will examine and draft deeds for Government in any Department.

D. *General.*

26. He will advise the Government in such important legal matters as may be referred to him.

27. When so directed by the Government he will conduct proceedings in cases where Government order a confidential enquiry or an enquiry into the conduct of public servants before any Court or a Commission appointed for the purpose.

28. The Government Advocate is debarred from taking any criminal work whatever from private persons. On the Civil side he is debarred from appearing against Government in any case to which Government is a party.

29. In cases under the Legal Practitioners Regulation the Government Advocate should consult the Secretary to Government, Legislative Department, as to whether his services are required by Government. If they are not so required he will be free to accept a brief from the legal practitioners concerned.

30. The Government Advocate will report to the Government through the Secretary to Government, Legislative Department, any flaws in legal enactments and any facts arising out of or in connection with cases conducted by him which he thinks or the Chief Court desires, should be brought to the notice of Government.

31. He will report through the same channel the result of all prosecutions, appeals from orders of acquittals, applications in revision or otherwise, made by Government, and of cases of which he has been requested by the Secretary to Government, Legislative Department, to report.

32. He will arrange to procure copies of any judgment or orders which the Government may desire to have.

33. As soon as an appeal in which the Government Advocate has appeared, has been decided in the Chief Court, the Government Advocate will submit a copy of the judgment and decree to the Secretary to Government, Legislative Department, for transmission to the Head of the Department or other officer concerned to enable the latter to take immediate steps where necessary for the realisation of costs.

E. Remuneration.

34. The salary of the Government Advocate will be Rs. 600—50—700.

35. (1) No separate fees in addition to his salary will be allowed to the Government Advocate for any of his duties except those mentioned in rules 21, 23, 24 and 27 *and 28*.

(2) In cases in which he is entitled to fees, the remuneration;

(a) for each day's attendance in a Criminal Court will be a fee not ordinarily exceeding Rs. 25 unless a higher sum is sanctioned by Government in consideration of the exceptional importance and difficulty of the case. When more than one case is conducted on the same day, separate fees not exceeding two-thirds of the above scale will be allowed for each case. When a case is adjourned without trial or merely struck off, the fee for the day should be limited to Rs. 5. No fee will be allowed for studying records, for receiving instructions, for presenting an application or for filing a list of witnesses.

(b) for conducting or defending a Civil Suit or proceeding, will ordinarily be the maximum amount calculated according to rates of costs of the suit assessable by the Court unless an additional sum is sanctioned by Government in consideration of the exceptional importance and difficulty of the case.

(c) in cases where the fee cannot be fixed under (b) such amount as may be awarded by the Government.

36. The bill for fees should be signed by the authority who consulted or instructed the Government Advocate and when the fee is for appearance in Court it should be signed by the Judge.

37. When the Government Advocate acts on behalf of Government in a place other than his headquarters he will be entitled to travelling allowance under the Mysore Service Regulations.

PUBLIC PROSECUTORS, GOVERNMENT PLEADERS AND THE
LEGAL PRACTITIONERS.

A.—Appointment.

38. The Public Prosecutor will also be *ex-officio* Government Pleader for his Division.

39. (1) The Government will appoint Public Prosecutors for each division,

(2) The appointment is tenable for three years and the incumbent is not entitled to leave or pension. The same person may be re-appointed after the expiry of his term.

(3) When Public Prosecutors and Government Pleaders have to be absent for short periods on account of private affairs, sickness or other sufficient reason, it is their duty to make satisfactory arrangements in communication with the District Magistrates and the District Judge for the conduct of Sessions and other work devolving on a Public Prosecutor and Government Pleader, without entailing additional cost to Government.

(4) In other cases the sanction of Government both to the grant of leave and to the acting arrangements found necessary, should be obtained.

B.—Duties—Criminal.

40. As Public Prosecutors, they will conduct all prosecutions before Sessions Courts.

41. When required by the District Magistrates, in cases considered by him to be of special interest and importance, he will support convictions by the Assistant Sessions Judges and the Magistracy, in Sessions Courts. The Public Prosecutor will act as the representative of Government in the Court of Sessions and in that capacity shall receive and act upon all notices issued by such Court.

42. The Public Prosecutor may also be instructed by the District Magistrates with the previous sanction of Government, to appear for the Government in cases of special importance of difficulty in the Court of any Magistrate.

43. They will conduct the prosecution in cases under Section 14 of the Legal Practitioners' Regulation, 1884, unless in special cases, this duty is assigned to the Government Advocate.

44. Should the Public Prosecutor be disqualified from representing the Government in an appeal by reason of his having appeared for the defence in the Court of the convicting Magistrate or for any other sufficient reason, the District Magistrate, shall appoint a properly qualified practitioner as Public Prosecutor in such appeal.

45. A Public Prosecutor may not appear for the defence in any inquiry under Chapter 18, Code of Criminal Procedure (Committal Proceedings before a Magistrate): With this exception he may practice in Criminal Courts without restriction subject however to the condition that he should not take up any case on behalf of any private person, whether a complainant or an accused, in which he has reason to believe that his services have been, or are likely to be, requisitioned by the Government.

46. The District Magistrate, is entitled to consult the Public Prosecutor upon any legal question arising out of a Criminal Proceeding, but except as provided in Rule 42 is not authorised to require him to appear in a case tried by, or inquired into, by a Magistrate.

C.—Civil Work.

47. As Government Pleaders they will conduct or defend Civil suits (including appeals) on behalf of Government, or an

officer of Government, in the District Court and other Subordinate Courts located in the head-quarters of their respective Divisions.

48. For the conduct of Civil cases in other Courts, a local Pleader will ordinarily be employed.

49. They will, when specially required, represent Government in Civil cases and proceedings in Courts other than those mentioned in Rule 47.

D. General.

50. When the permanent Public Prosecutor is not available, a substitute must be appointed for the conduct of the prosecution of every Sessions case by the District Magistrate. There may however be exceptional cases committed to the Sessions in which Government is not really interested, cases of a quasi-private nature and the like in which it is neither necessary nor desirable that Government should incur the expenses of engaging special Counsel. In such cases when the ordinary Public Prosecutor is for any reason unable to appear it will sufficiently meet the requirements of the law if the District Magistrate appoints a Police Officer not below the rank of Assistant Superintendent of Police to conduct the Prosecution. Such officer will be a Public Prosecutor within the meaning of Section 4, Sub-section. (i) clause (t) Criminal Procedure Code.

51. In Sessions cases a copy of the charge, the reasons for commitment and depositions of witnesses as well as of the statement of accused in Committing Magistrate's Court, should be supplied by the office of the Committing Magistrates to the Public Prosecutor concerned immediately after commitment.

52. In order that Public Prosecutors may familiarise themselves with documents in evidence and other papers on the records of Sessions cases, the Sessions Judge concerned should give every facility for inspection of such records by the Public Prosecutors.

53. On receipt of notice of commitment under Section 218 of the Code of Criminal Procedure, the Public Prosecutor should on the earliest opportunity examine the records of the proceedings before the Committing Magistrates, and see that any defect (such as the omission to summon a necessary witness) is, if possible, remedied before the date fixed for hearing in the Court of Session.

54. It is important that Public Prosecutors should keep in close touch with District Superintendents of Police and other responsible Police Officers in connection with the conduct of cases on behalf of Government. Public Prosecutors should also furnish such Police Officers with any information or reports as regards such cases which may be reasonably demanded by them.

E. Remuneration.

55. The salary of a Public Prosecutor will be Rs. 200—500—300 per month for his duties under rule 4D.

56. (1) He will be entitled to fees for other duties.

(2) In cases in which he is entitled to fees the remuneration,

(a) for each day's attendance in a Criminal Court, will be a fee not ordinarily exceeding Rs. 16 unless a higher sum is sanctioned by Government in consideration of the exceptional importance and difficulty of the case. When more than one case is conducted on the same day, separate fees not exceeding two-third of the above scale will be allowed for each case. When a case is adjourned without trial or merely struck off, the fee for the day should be limited to Rs. 5. No fee will be allowed for studying records for receiving instructions, for presenting an application or for filing a list of witnesses.

(b) For conducting or defending a Civil suit or proceeding, will ordinarily be the maximum amount calculated according to rates of costs of the suit assessable by the Court unless an additional sum is sanctioned by Government in consideration of the exceptional importance and difficulty of the case.

(c) In cases where the fee cannot be fixed under (b) such amount as may be awarded by the Government.

57. Other Legal Practitioners who are entrusted with the conduct of cases in which Government is interested, will be paid.

(1) in Civil cases a fee which will ordinarily be on the same scale as in Rule 56 (2) Clauses (b) and (c).

(2) In Criminal Cases when the Government Advocate and the Public Prosecutor are not available, such fee as the Government may decide.

58. The bill for fees should be signed by the authority who consulted or instructed the Legal Practitioner concerned and when the fee is for appearance in Court it should be signed by the Judge.

59. When the Public Prosecutor acts on behalf of Government in a place other than his headquarters he will be entitled to travelling allowance under the Mysore Service Regulations. A Legal Practitioner will get the same rates of travelling allowance as a Public Prosecutor.

PART II.

Conduct and Distribution of Legal Business.

60. When disputes arise between departmental officers and persons with whom they or the Government contract or enter into agreements, reference should be made to the Secretary to Government, Legislative Department, at as early a stage of the dispute as possible.

61. References may be addressed to the Government Advocate only in the following cases:—

(i) references relating to any pending criminal proceeding which the Government Advocate may be actually conducting, under proper authority in any Criminal Court;

(ii) references relating to the preferring of appeals against orders of acquittals;

(iii) reference relating to any pending Civil suit, appeal or proceeding which the Government Advocate may be actually conducting under proper authority in any Civil Court.

62. References may be addressed to Public Prosecutors direct, only with regard to pending Civil and Criminal Cases and proceedings which they are actually conducting or are required to conduct in any Court.

63. Unless otherwise expressly permitted by any rule references to the Secretary to Government, Legislative Department, for opinion may be made by or through the following officers only:—

(a) The other Secretaries to Government.

(b) Heads of Departments, in matters connected with Civil or Criminal Justice.

64. When a case by or against or affecting Government is actually pending in any Court any Officer of the department to which it relates, who is concerned in the conduct thereof may communicate direct with the Law Officer, Legal Practitioner, or other person who is conducting the proceeding, on behalf of Government.

65. Legal questions arising before Judicial Officers as such must not be referred to the Secretary to Government, Legislative Department.

66. Every case referred to the Secretary to the Government, Legislative Department, for his opinion or his advice should be accompanied by a note, either stating the facts of the case, or referring in proper order to the documents or parts of documents which indicate the facts and points for opinion. The letter of reference should state the precise points on which opinion or advice is sought. All available documents or copies thereof should be sent therewith.

67. Where an appeal is to be filed in the Chief Court against the decisions of Sessions Judges, the District Magistrate should forward a copy of the judgment against which the appeal is to be filed, for the information of the Government Advocate and also, whenever feasible, a copy of the evidence and other connected papers. He will arrange to give the Government Advocate necessary instructions for the preparation of the memorandum of appeal and the prosecution of the appeal.

68. The District Magistrates should bear in mind the responsibility which rests upon them to bring to the notice of Government instances of perverse or careless acquittal in which importance of the case and the probability of securing a conviction justify a resort to procedure being taken under Section 417 of the Code of Criminal Procedure.

69. The Proceedings in such cases will ordinarily be initiated by the District Magistrate, either on his own motion or on that of the Police. He will forward the record of the case together with a concise history of the facts, a statement of the grounds of appeal, and the opinion of the Government Advocate through the Secretary to Government, Legislative Department for the orders of Government. In submitting proposals for appeals against acquittals the District Magistrates should invariably give their own independent opinion and not merely forward the representation of Public Prosecutors or District Superintendents of Police.

70. In any case in which the Inspector-General of Police considers that an appeal should be filed he may move the District Magistrate to that effect. Should he refuse to move in the matter and the Inspector-General be unable to accept the reasons for the refusal or should the circumstances of the case be such that a reference to the District Magistrate would involve such delay as to prevent the appeal being filed within the prescribed time, the Inspector-General may refer the case direct through the Secretary to Government, Legislative Department, for the orders of Government.

71. As regards revisions in cases in which the Government applies for revision the application may be made by the District Magistrate or Sessions Judge direct under Section 438, Criminal Procedure Code or it may be made by the Government Advocate under the orders of the Government, on the report of the District Magistrate. In the latter case the Government Advocate, will appear in compliance with instructions received from the Secretary to Government, Legislative Department, and will himself present the application for revision and apply for permission to be heard under Section 440 Criminal Procedure Code. In cases in which a reference is made direct by the District Magistrate the Government Advocate will receive a notice from the Chief Court.

72. The responsibility for sending the necessary papers to the Government Advocate and instructing the Government Advocate will rest with the District Magistrate.

73. As regards the conduct of appeals from the decisions of the Magistrates of the Third and Second Class to the District Magistrate, and from the decisions of the Magistrates of the First Class to the Sessions Judge, the responsibility will rest with the District Superintendent of Police or the Assistant Superintendent of Police concerned, who will decide whether

a case is important or intricate enough to necessitate the representation of the Government. They will utilize the services of the Prosecuting Inspectors and see that they get the necessary papers and proper instructions for the prosecution of the appeal.

CIVIL LITIGATION.

Cases in which Government is a party.

A.—The Government as plaintiff.

74. No suit on the part of Government can be instituted in the civil court against any person without the sanction of the Government.

75. (1) The institution of a suit on behalf of Government should not be recommended by Departmental or Executive Officers until the proposed defendant has received ample opportunity of stating his view of the case and of coming to an agreement for the settlement of the Government claim out of court.

(2) While it is the duty of the officer of Government to enforce the just rights, and protect the interests of Government they should not have recourse to the law until all efforts to effect an amicable adjustment have failed.

(3) The case for Government should first be enquired into departmentally and evidence secured on all points which are likely to be contested.

76. Whenever it appears to the Deputy Commissioner or to the principal executive officer in any department in a district, that a suit on the part of Government ought to be instituted in the Civil Courts he will submit to the Head of the Department concerned a complete report of the circumstances of the case. The Head of the Department will forward his report with his opinion to the Secretary to Government, Legislative Department, for the orders of Government.

77. The Secretary to Government, Legislative Department, will then thoroughly inform himself of the whole of the circumstances, call for such further information or additional papers as he thinks necessary, and submit for orders with his opinion in detail as to the advisability of instituting a suit.

78. The report of the officer should contain, *inter alia* the following particulars:—

(a) The circumstances which, in his opinion, render the institution of the suit necessary, and precisely when and where they each occurred.

(b) The exact nature of the claim for which it is to be brought.

(c) A clear statement of all the evidence both oral and documentary by which the claim can be supported.

(d) Copies of the written document, if any, upon which the claim is based and any other papers, the inspection of which is considered necessary for the elucidation of the case.

(e) The pleas or objections if any, which have been urged by the proposed defendant against the claim.

(f) The evidence both oral and documentary which, so far as is known the proposed defendant will be able and is likely to adduce in his defence: and

(g) Any other material facts *e.g.*, the circumstances of the proposed defendant, any special reasons for the institution of the suit apart from the amount claimed, whether its decision will affect other claims and the like.

* 79. In cases of urgent necessity where the delay necessary for the reference to Government may be very prejudicial, the officer concerned may, on his own responsibility, file a suit, but he must immediately report having done so and transmit full particulars as above.

80. Whenever the officer concerned considers it expedient, he must take steps for attachment before judgment of the property of the defendant, or for an injunction or other interlocutory order.

81. It should be stated in the report whether, or not the circumstances of the person against whom it is proposed to institute the suit are such as to render it likely that a satisfaction will be obtained of any decree that may be given against him.

82. The probability of the recovery of a sum, at least equal to the costs, should be ascertained before recommending the institution of any suit unless for reasons which should be explained, it is considered that the suit should be brought notwithstanding that the recovery of costs is doubtful.

83. If the institution of the suit be sanctioned, a draft of the plaint will be prepared by the Government Pleader of the Division or the Legal Practitioner engaged in the suit, in consultation with the officer who proposed its institution, and will be submitted by him direct to the Secretary to Government, in the department concerned for approval. After the latter has accorded his approval thereto, the plaint shall be signed by the Officer concerned verified and presented by the said Government Pleader or the Legal Practitioner. True copies of the plaint as actually presented in Court, of any written statement filed by a defendant and of the issues framed in each suit, as well as of any subsequent amendment of the issues or additional issues under Rule V of Order 14 of Schedule I of the Code of Civil Procedure, should also be sent without delay by the Government Pleader or Legal Practitioner to the Secretary to Government, Legislative Department.

B.—The Government as defendant.

84. On receipt of the notice given under Section 80 of the Code of Civil Procedure, through the Chief Secretary to Government, the Secretary to Government, Legislative Department should give it immediate and careful attention. The complainant should be desired, when his statement as to the right asserted or infringement of right alleged, or as to the officer whose acts are impugned, is vague, to set these points forth, succinctly and clearly as the most effectual means towards obtaining such relief as may properly be given.

85. The conduct or act complained of may have been either (1) wholly indefensible (2) justifiable, or (3) of a mixed or doubtful character. In every case the officer receiving the notice should endeavour, without prejudice, to determine to which of these classes it is to be assigned. If it is indefensible it is his duty to do what lies in his power to give immediate relief or to obtain it by a full report to the proper authorities. If the complaint is plainly groundless or if the threatened action is one which must undoubtedly be defended if it is brought, no further notice need be taken of the complaint. In the third class of cases, the officer receiving the notice should use every possible effort to distinguish between acts which have been properly done in the discharge of public duty and those in which through carelessness, ignorance or imprudence, some real cause for complaint has been given. On such analysis the cases should be dealt with according as they fall under one of the two heads already considered. When there is a doubt as to the real intention of the Government or of a superior authority in any order the carrying out of which has occasioned the complaint, that doubt should be cleared up by an immediate reference. When there is a doubt as to the legality of the act complained of though it may have been done in apparent fulfilment of a Rule or Order issued by a superior authority a clear statement of the case should be submitted for orders.

86. When a suit has been instituted, if it is against Government and the summons is therefore served on the Chief

Secretary, a copy of the plaint and the copy of the summons received (with the date of its receipt noted on the back) should be forwarded to the officer who himself or by his subordinates is alleged to have given room for the plaintiff's cause of action.

87. If owing to the suit being against an officer in his official capacity the summons is served on that officer personally he will act according to the instructions given in rules 88 and 89.

88. The officer to whom the Government send a copy of the plaint and any officer who is sued in his official capacity and who desires that Government should undertake the defence of the suit, shall collect with the least practicable delay all the information regarding the facts of the case which he can procure.

89. He is then, within one month from the date of his being first apprised of the Institution of the suit, to submit the following papers through the ordinary channel of communication, to the Head of his Department, *viz.*:--

- (a) a copy of the plaint together with copies of any document or list of documents annexed to the plaint;
- (b) a translation of the same into English when it is in Vernacular, in half margin, the more important of the statements therein being distinctly marked with letters (a), (b), etc., and notes being added in the margin stating whether such statements are correct or not, and if not, in what respect they are inaccurate: (when the requisite explanation cannot be thus compressed, reference should be made to the paragraph of the accompanying statement in which the matter should be fully discussed);
- (c) a full and detailed statement (1) of the circumstances which led to the suit, (2) of the course which it is proposed to adopt, namely, whether to admit, compromise, or defend the suit, and of the reasons for the same, and (3) if it is proposed to defend the suit, of the grounds on which it is proposed to base the defence, and of the evidence to be adduced;
- (d) if the case turns on documentary evidence, copies of the documents (or the originals) relied on by the plaintiff (if procurable) and by the defence;
- (e) all the correspondence written and proceedings, whether in English or in the vernacular, connected with the subject-matter of the suit together with translations of important vernacular papers connected with the subject matter of the suit, and if files of papers are being sent, distinguishing marks should be used so as to indicate the papers to which attention is to be directed.

90. The forwarding report should state distinctly (1) the number of the suit, (2) the date on which, and the Court in which it was instituted, (3) the names of all the parties, (4) the amount or value of the claim, (5) the date fixed by the Court for the first hearing, and (6) whether notice of the action has been given under Section 80 of the Civil Procedure Code, and if so, the date of delivery of such notice.

91. If the suit is against an officer in his official capacity, he shall instruct the Government Pleader, or the Legal Practitioner engaged to move the Court from time to time, to grant an extension of the time for hearing the claim, under Order XXVII Rule 7, of the Civil Procedure Code, until the orders of Government are received. In the case of suits against Government, the Government Pleader or Legal Practitioner shall make the necessary applications to the Court for time, under Order XXVII, Rule 5, of the Code, without express instructions. If in any instance the Court is likely to decline to grant further time, it is the duty of the Government Pleader or Legal Practitioner to

inform the officer concerned in the defence of the suit, and, in emergent cases, the Secretary to Government, Legislative Department.

92. If two or more officers belonging to different departments are sued conjointly, or if the plaint in a suit against Government relates to the acts of two or more such officers, they should with the least possible delay, communicate one with the other, and after, if possible, mutual consultation with a view to a common line of defence, arrange for the preparation of a joint report. When a joint report is not sent, a separate report should be submitted simultaneously by each officer, care being taken by the officer, principally concerned that all the requirements of Rule 89 are complied with.

93. If the defence of a suit against Government is sanctioned, or if Government undertakes the defence of a suit against an officer in his official capacity, a draft of the written statement to be filed in answer to the plaint and prepared in consultation with the officer or officers concerned, shall be submitted by the Government Pleader or Legal Practitioner to the Secretary to Government, Legislative Department, for approval and the written statement, as approved or revised by the Secretary to Government, Legislative Department, shall be subscribed by the officer concerned, verified and presented to Court by the Government Pleader or Legal Practitioner.

94. Sanction to the defence of a suit, the plaint in which it not accepted for want of jurisdiction but returned for presentation to the proper Court having jurisdiction or which is dismissed on account of some technical objection such as want of due notice, shall, for the purposes of the above rule, be held to include sanction to the defence of any subsequent suit based on the same or a similar cause of action, that may be brought by the same plaintiff unless, in the opinion of the Secretary to Government, Legislative Department, there are special reasons which render it desirable to obtain further orders from Government in the matter.

95. In any such case the report under Rule 89 should be confined to forwarding such papers and information as are necessary to enable the Secretary to Government, Legislative Department, to consider whether any modification of his previous opinion, or addition to, or alteration in the grounds on which it was proposed to defend the former suit, is requisite. If the Secretary to Government, Legislative Department, considers there are no special reasons which render it desirable to obtain further orders from Government in the matter, he shall communicate his instructions for the defence of the new suit to the officer submitting the report under Rule 94 and to the Government Pleader or Legal Practitioner, who shall thereupon proceed in accordance with Rule 93.

96. The written statement and the issues sought on behalf of Government are ordinarily to be in strict accordance with the opinion of the Secretary to Government, Legislative Department, so far as concurred in by Government, but the Government Pleader or Legal Practitioner is responsible in communication with the officer concerned in the suit, for the correctness and exhaustiveness of the details of the defence.

97. A true copy of the issues framed in each suit, as well as of any subsequent amendments of the issues or additional issues under Rule 5 of Order XIV of Schedule I of the Civil Procedure Code, should be sent without delay by the Government Pleader or Legal Practitioner to the Secretary to Government, Legislative Department.

98. Whenever necessary or expedient, the Court should be moved to require from the plaintiff security for costs of the suit.

CONDUCT OF SUITS.

99. On receipt of the sanction of Government to the action proposed in the reports referred to, the Secretary to Government, Legislative Department, will issue instructions *re* the institution or defence of the suit as the case may be. These instructions may specify the person to whom the conduct of the case on the part of Government will be entrusted but the officer concerned will ordinarily make the actual arrangement for the engagement of counsel when this is necessary.

100. On the receipt of the instructions the person entrusted with the conduct of the case will be responsible for all further measures that may be required.

101. When a suit is under trial some intelligent officer thoroughly conversant with the facts of the case and the practice of the department concerned therewith should be deputed to be present to instruct the Government Law Officers as to the truth concerning matters which arise unexpectedly and to direct their attention to the documents or other evidence that may become important at each stage of the trial.

102. Should there be a difference of opinion between the Government Law Officers and the officer at whose desire the suit has been instituted or defended, as to the manner of conducting the case, a reference shall forthwith be made by the Government Pleader or Legal Practitioner to Government in order to obtain instructions of Government as to the manner in which the case is to be conducted. Should there be no time to consult Government the matter shall be left to the discretion of the law officer who may be in-charge of the case.

103. The following important points relating to the conduct of all suits should be carefully attended to by Government Pleaders or Legal Practitioners and all officers concerned (namely):—

- (a) the averments in a plaint, or in a written statement, should generally be based in every material point on the proof which can be adduced in support of them;
- (b) the evidence, whether oral or documentary, on which it is intended to rely should be carefully scrutinized by the Government Pleader before it is adduced, and he should advise as to its admissibility, and probable importance or unimportance, for the purposes of the suit, and suggest what evidence, if it be forthcoming, may with advantage be substituted for any which, in his opinion, would be weak or inadmissible;
- (c) all the available evidence should be assiduously collected and made ready for the day fixed for its reception, and the necessity of making applications for adjournment should as much as possible, be avoided and such application on behalf of the opposite party should, unless they are made for sufficient reasons, be resisted as tending to prolong the litigation, and to give opportunities for the fabrication of false evidence;
- (d) all documentary evidence should be ready and should be produced at the first hearing of the suit, *i.e.*, the day fixed for the settlement of issue, as required by Order XIII, Rule I (I), of the Civil Procedure Code, and when a suit is instituted, the documents sued upon should be produced in Court when the plaint is presented; together with copies thereof, as required by Order VII, Rules 14 and 17, of the Code, and the list of other documents relied upon as evidence, which is required by Order VII, Rule 14, to be annexed to the plaint, should be very carefully prepared.

Applications to the Court to accept any document in evidence, at any subsequent stage of the trial, should, unless under special circumstances, be avoided, as such applications cannot be granted without the grant of similar indulgence to the opposite party, which may place Government at a disadvantage and should be resisted, as providing occasion for forgery ;

- (e) documents filed by the opposite party should be carefully examined at the earliest opportunity, and compared with originals in the Government records, or with other papers which may tend to establish or subvert their authenticity ;
- (f) the production of documents in the possession of Government or of any Government Officer when lawfully required by the Court, or by the opposite party, should not be resisted unless for good and sufficient reasons such as are recognized by law, but the question of the admissibility of the documents when produced should be carefully considered and argued, it being borne in mind that the opinions of individual officers contained in official correspondence (which is so often called for by persons engaged in litigation with Government in order to establish their case) are, as a rule, not admissible in evidence ;
- (g) The object of Government in sanctioning either the institution or defence of any suit is simply to establish the truth ; and whilst Government expect the utmost vigilance and care on the part of those entrusted with the conduct of litigation on their behalf in asserting and protecting their just interests, they would impress upon pleaders who have the charge of cases that they will not countenance any attempt to snatch an unfair advantage by the withholding of important evidence, or by any disingenuous proceeding whatever.

104. The officer entrusted with the conduct of the case will at once send to the Secretary to Government, Legislative Department, a copy of the judgment passed in the suit.

APPEALS.

105. If the decision is either wholly or partially adverse to Government, the Government Pleader or Legal Practitioner when forwarding copies of the decree and judgment to the officer concerned, shall state his opinion with reasons as to whether an appeal should be made.

106. The officer after perusing the judgment shall call upon the Government Pleader or Legal Practitioner to send him copies of such of the exhibits recorded in the case as he deems necessary to explain the grounds of the decision so far as it deals with the merits of the case (or in important cases of all the material exhibits) and shall forward them together with the copies of the judgment and decree already received from the Government Pleader, or Legal Practitioner with a report stating his opinion as to whether the decision should be acquiesced in or appealed against, direct to the Secretary to the Government, Legislative Department.

107. This report must be despatched so as to reach the Secretary to Government, within fifteen days after the date of decree in cases in which an appeal lies to the District Judge and within one month after the said date in cases in which an appeal lies to the Chief Court.

108. A copy of the report shall be sent simultaneously to the Head of the Department who, if he concurs in it, will merely file it but if he differs from it; or considers it otherwise necessary

to address Government on the subject of it, shall submit a separate report on it without delay to Government.

109. The Secretary to Government, Legislative Department, after calling for such further information or additional papers as he thinks necessary, shall submit his opinion as to whether an appeal should be made or not or as to what other course should be pursued. This must be done in time to enable the orders of Government upon it to be acted upon if necessary within the period prescribed by law for filing an appeal.

110. If an appeal be sanctioned, the officer concerned will instruct the Government Pleader in the District Court or the Government Advocate in the Chief Court accordingly, at the same time sending him Vakalatnama if the suit is against him personally. The records received by the Secretary to Government, Legislative Department, shall be sent to the Government Pleader or the Government Advocate as the case may be.

111. Appeals are ordinarily to be based strictly on the grounds recommended by the Secretary to Government, Legislative Department, and concurred in by the Government: but when an appeal is sanctioned generally against a decision the Government Pleader is responsible for availing himself of all legitimate grounds on which the decree may be open to objection. In important or intricate cases the memorandum of appeal should be submitted to the Secretary to Government, Legislative Department, for approval of Government before being filed in Court.

112. If an appeal is brought by the opposite party against the decision either entirely or partly in favour of Government a notice of the appeal will be served by the Court either on the Government Pleader or the officer concerned. In the former case the Government Pleader shall at once obtain a copy of the memorandum of appeal and forward it and the notice received by him (with the date of its receipt noted on the back) to the officer concerned. In the latter case the officer concerned shall at once send the Government Pleader the Vakalatnama and obtain from him a copy of the memorandum of appeal.

113. The officer concerned shall then report his opinion as to whether the appeal should be defended and make any explanation or remarks that may be needed with reference to the grounds of appeal. His report should be submitted to the Head of his Department and be accompanied by the same documents as are required to accompany a report under Rule 106.

114. The Head of the Department shall refer the report with his own opinion to the Secretary to Government, Legislative Department, and the provisions of Rules 109 and 110 shall then apply to the said report and the Secretary to Government with regard to his duty in respect thereof and to the instructions of the Government Pleader if the defence of the appeal is sanctioned by Government.

115. The provisions of Rules 101 and 102 apply equally to the conduct of appeals as to the conduct of original suits except:

that a discretion must be exercised by the Government Pleader in meeting new points raised for the first time in appeal, but that he should apply for an adjournment to enable him to consult with the officer concerned or with the Secretary to Government, if necessary, on any such points in which he may not have been fully instructed or to furnish an immediate reply.

116. When an appeal has been decided by a District Court the provisions of Rule 104 shall be observed as far as they are applicable just as in the case of the decision of an original suit.

SECOND APPEALS.

117. When an appeal from an original decree has been decided by a District Court either wholly or in part adversely to

Government the same course is to be pursued with respect to the bringing of a second appeal as in the case of an appeal from an original decree, provided that if the Secretary to Government, Legislative Department, is clearly of opinion that the case is one in which the law allows no second appeal, it shall not be necessary for him to refer it for the orders of Government.

118. When a second appeal is brought against an appellate decree either wholly or partly in favour of Government the same course shall be pursued as when an appeal is brought in the Chief Court against a similar original decree.

119. When an appeal whether against an original or appellate decree has been decided by the Chief Court the Government Advocate shall communicate the nature of the decision as soon as it is pronounced to the Secretary to Government, Legislative Department, giving a brief statement of the grounds of the decision.

120. He shall also obtain with as little delay as possible two certified copies of the Court's judgment and of the decree and forward one to the Secretary to Government and the other with the papers in the case to the officer concerned. The officer shall inform the Head of his Department of the result of the case sending him the copy of the written judgment if any or not as he deems necessary.

EXECUTION OF DECREES

N.B.—Decree includes an order of a Civil Court as defined in Section 2 of Code of Civil Procedure.

121. In the case of decrees under which money is due to Government, the officer concerned shall, as soon, after the decree, as possible, obtain through the Pleader engaged in the case, a copy of the decree and in the absence of any special instructions to the contrary proceed as follows:—

(a) If the person from whom the amount is due or his pleader, is known to the officer or the Government Pleader, and is readily accessible to either of them, they shall endeavour to recover the amount from him.

(b) If there is reason to think that the amount due cannot be recovered under clause (a) and the officer or the Government Pleader know of any property of the judgment debtor from which the amount due or part of it may be realised (e.g. immovable property, securities, money deposited in courts or the subject matter of a suit on which Government have a first charge under Order 33, Rule 10 of the Civil Procedure Code), they shall at once, or as soon as any necessary information has been obtained, make an application for execution by attachment, etc., of such property. If any property has already been attached before judgment, application for sale of the property may be made. (In order to be in a position to make such an application without delay, the Government Pleader, shall in any suit or other case where he appears on behalf of Government or a Government officer and where he has reason to think that there may be difficulty in executing a decree in favour of Government obtain before the suit or case is decided from the officer concerned instructions in writing as to how he shall proceed in the event of a decree being passed in favour of Government and detailed information as to any property for the attachment, etc., of which such an application might be made.)

(c) Where action is not taken under clause (a) or (b), the officer concerned shall without delay send the copy of the decree to the Secretary to Government, Legislative Department, through the usual channel with a report stating *inter alia*

- (i) the reasons for not taking such action
- (ii) the date on which the period of limitation for the execution of decree will expire, and

(iii) any information which has come to his knowledge and the possession of which is likely to facilitate the recovery of the money due to Government.

(d) Where action is taken under Clause (a) or (b) the officer concerned shall as soon as possible at any rate within one month of the date of receipt of the copy of the decree, report his proceedings to the Legislative Secretary, through the usual channel and send him the copy of the decree if no longer required by him. He shall also report the result of his proceedings on their completion and if they have not been successful in recovering the whole of the amount due furnish the information specified in items (ii) and (iii) of Clause (c).

122. In cases where the whole amount due has not been recovered the Deputy Commissioner on the request of officer concerned shall through the Revenue or other agency make enquiries as to the property and means of the person liable and report the same to the officer concerned.

123. (1) The officer concerned may then pass such orders for the making of an application in court for the recovery of any amount due or for the recovery thereof by other lawful means, as he may think fit.

(2) Where any sum due to Government under a decree is recovered otherwise than through the agency of the court, the Government Pleader should be instructed to certify such recovery to the court under Order 21 Rule 2 of the Civil Procedure Code.

(3) As soon as a Government Pleader recovers any money on behalf of Government in execution of a decree he shall at once pay the amount into the treasury to the credit of the department concerned and report the fact to the officer concerned.

124. Orders under the above rule shall be passed on all cases in sufficient time to admit of an application to the Court, if such application is directed, being made within the period prescribed by the law of limitation.

125. If an appeal is instituted and the execution of the decree is stayed by order of the court, the interval before the decision of the appeal should be employed in making enquiries as to the property of judgment debtor.

126. Upon the court ordering the attachment of the debtor's property the Government Pleader shall at once apply to the officer concerned to depute some one to accompany the attaching officer and to point out the property.

127. In case claims are made by third parties to the property attached the officer on whose report the property was attached shall collect the evidence, by which it is proposed to show that the property belongs to the debtor and he shall if possible be present in court and instruct the Government Pleader when the case comes on for trial.

128. If it appears altogether improbable that the person liable will be able to pay what is due by him under the decree or the balance of what is so due by him, within the period limitation, or if for any reason the officer concerned thinks it inexpedient that such person should be further pressed, he may apply to Government through the Secretary, Legislative Department, for sanction to write off the amount still due, but as a general rule steps for the recovery of such dues should be unremittingly continued until the period of limitation expires when, if necessary, steps should be taken by the officer concerned as aforesaid.

129. (i) The Head of each Department shall keep in his office a register of amounts due to Government under decrees in the following form, and shall have the necessary particulars entered therein on receipt of the copy of any such decree and from time to time as occasion requires.

(ii) This register should be kept in separate parts 1 and 2 for entries in respect of (1) amounts due to Government under decrees in suits, appeals or applications to which Government or a Government Officer is a party, and (2) court fees and pauper costs payable to Government under Order 33 or 44 of Civil Procedure Code.

Serial No. of case	Name of court which pass the decree	No. and year of suit or appeal or application	Name of parties	Date of decree
1	2	3	4	5

Date on which the period of limitation expires	Judgment debtor			Amount due to Government	
	Name	Residence	Occupation	On what account	Amount
6	7	8	9	10	11

Steps taken for recovery		Recoveries effected			Date of credit to Treasury
Nature of step	Date of taking steps	How recovered	Date	Amount	
12	13	14	15	16	17

Written off as irrecoverable		Net balance to be recovered	Remarks (here enter any information available as to judgment debtor's pecuniary circumstances what property if any he owns, etc.
No. and date of G. O. or officer's order	Amount		
18	19	20	21

MISCELLANEOUS.

130. Expenses connected with the institution, defence and the conduct of any suit or proceeding will be met by the department concerned, from out of its budget grants. Recoveries will also be credited to the department.

131. Advances of money necessary for the initial and subsequent expenses of a suit or proceeding will be made by the department concerned, after obtaining sanction of Government. In urgent cases, however, the necessary amounts may be advanced, and the matter reported to the Government through the Secretary, Legislative Department, for sanction.

132. Copies of documents on the Government records are often applied for as means of supporting a claim either before or after commencement of a suit against Government. Such copies should be furnished when the documents are of a public character and are pertinent to the cases for which they are required. Copies of confidential communications

as those between Government and an officer or between one officer and another dealing with particular transactions or the rights or duties of individuals should not in general be given. In cases of doubt the proper criterion to apply is whether, if a copy is refused the original may properly be called for by the court or whether such a call may properly be resisted according to the principles of the Evidence Act. Every copy taken or its original should be carefully considered by the Government Pleader for whose perusal it will be submitted by the officer making the copy.

133. When documents in the charge of a Head of a Department are called for by a court he should consider whether they include communications made in official confidence, the production of which will be injurious to public interest. To the production of such documents he should object and he will be careful to prevent his subordinates transgressing this rule upon summons directed to them personally instead of to himself in whom the custody of the documents is vested and without those orders subordinates are not at liberty to remove or otherwise deal with documents of the department.

134. If it appears advisable to an officer of Government to intervene in any suit to which Government have not been made a party or if he shall deem it necessary to institute, or shall be called upon to defend any miscellaneous proceedings on behalf of Government the rules prescribed for regular suits in all their stages shall *mutatis mutandis* be deemed applicable provided that in cases of emergency the officer may act in anticipation of the orders of Government, but shall at once report his proceedings through the channel prescribed by the said rules.

135. No suit, or other civil proceeding is to be settled out of court or compromised in court by any officer of Government without the express orders of Government to be obtained through the Secretary to Government, Legislative Department, after submitting a full explanation of the course proposed to be adopted.

136. All correspondence and all orders of Government on the subject of suits or other civil proceedings are to be regarded by all officers of Government and by all pleaders into whose hands they may come, as strictly confidential. No public officer shall grant copies of any such correspondence or Government orders during the pendency of the suit or civil proceeding or until its final decision by the highest court before which it is likely to be brought for any reason whatever and no such copies shall be granted at any time after such final decision without the previous sanction of the Head of the Department.

137. When the exhibits in an original suit or other proceeding are so numerous or so important as to necessitate a Government Pleader's obtaining copies thereof for his own use or for that of special counsel and whenever a Government Pleader for any reason whatever obtains copies of any such exhibits he shall take care to have them legibly written on one side only of the paper with a quarter margin so that they may be afterwards used by counsel and others in every subsequent stage of the case.

o Certified stamped copies should only be obtained when they are required for filing in the court or when these rules expressly state that certified copies should be procured.

English translations must be sent of all vernacular papers intended for the use of Government.

138. At every stage of important development in all cases either civil or criminal, the law officer concerned should make a report to the Secretary to Government, Legislative Department, and obtain instructions.

139. If in any case the interests of the Government suffer owing to negligence or inadvertance of the officers concerned they will be held personally responsible for the loss.

140. Government are not bound to defray the cost of defence in suits against Government officers. The officers concerned must undoubtedly bear them where their proceedings have been condemned as irregular and opposed to law, or to the standing orders of Government, or the established practice of the Department concerned.

141. Extracts of register maintained under Rule 129 should be sent to Government in the Legislative Department every quarter.

142. The Government Advocate, Government Pleaders and Public Prosecutors shall send to the Secretary to Government, Legislative Department, every quarter the following returns in addition to any that they may be sending now. Other Legal Practitioners will also send the same returns in respect of cases in which they are engaged. When there are no cases to be entered in the return it shall be sent blank.

I. Return of original suits, appeals and other civil proceedings instituted or pending during the quarter ending in which the Government Advocate, the Public Prosecutor or Legal Practitioner represented the Government.

Court in which instituted	Nature of case i.e., whether an original suit, appeal or other Civil Proceeding and amount and description of claim.	No. of case	Date of institution.	Parties	
				Plaintiff Appellant or Petitioner	Defendant Respondent or Opponent
1	2	3	4	5	6
Date fixed for the hearing	Dates of previous hearing	Stage of pendency	Final Disposal		Remarks
			Date	Result	
7	8	9	10	11	12

II. Return of Execution proceedings for the quarter ending.

Court in which instituted	No. of the original case with date of decree	Date of institution	Parties	Previous application if any with dates	Relief asked for
1	2	3	4	5	6

Result	Recoveries if any	Date of credit into treasury	Balance still to be recovered	Remarks
7	8	9	10	11

III. Return of Criminal Cases for the quarter ending

Court in which instituted	No. of case	Date of institution	Parties	
			Complainant Appellant or Petitioner	Accused, Respondent or opponent
1	2	3	4	5

Date fixed for the hearing	Dates of previous hearings	Stage of pendency	Final Disposal		Remarks
			Date	Result	
6	7	8	9	10	11

S. O.

Government of His Highness the Maharaja of Mysore.

GENERAL AND REVENUE DEPARTMENTS.

G. O. No. P. 4400-65—Cts. 19-24-5, dated 19th February 1925.

Rules for the Conduct of Legal Affairs of Government.

Amends the —

READ—

Rules for the conduct of the legal affairs of Government issued in G. O. No. P. 4966-5045—Cts. 76-23-1, dated the 10—19th March 1924.

2. Letter No. 856, dated the 24th June 1924, from the Government Advocate in Mysore, stating that the new rules have prejudicially affected his status, independence and emoluments and requesting reconsideration of the rules.

ORDER No. P. 4400-65—Cts. 19-24-5, DATED 19TH FEBRUARY 1925.

The Government Advocate represented that—

(1) The new rules issued with the Government Order read above have reduced the position of the Government Advocate from being the Chief Law Officer of Government to that of a subordinate to a secretariat Officer.

(2) He has been deprived of the fees for conducting Civil and Miscellaneous cases in the Chief Court and he is also debarred from taking up criminal cases in which Government is not a party and public interests are not involved.

(3) The scale of fees fixed for his remuneration in cases in which he is entitled to fees is very low as compared with those of the British Indian Provinces.

(4) Rule 18 (2) limiting the period of appointment to 3 years is not applicable to him since no time limit was fixed when he was appointed.

Government have considered carefully all these points and are pleased to direct that the following modifications in the Rules for the Conduct of the Legal Affairs of Government be made—

(1) Delete Rule 2.

(2) For Rule 7—read as follows:—

“In matters connected with Civil Justice, the Secretary to Government, Local and Legislative Departments, will be responsible to Government to see that suitable arrangements for the conduct of all suits, appeals and proceedings affecting Government are made.”

(3) For Rule 13—read as follows:—

“The Secretary, Local and Legislative Departments, may attend courts for the purpose of watching the conduct of any case, Civil or Criminal, on behalf of Government.”

(4) Include Rule 22 in the exceptions mentioned in Rule 35 (1).

(5) As regards the term of office, Government see no reason to alter the rule.

(6) Separate orders will issue as regards the question of raising the existing scale of fees.

B. NAGAPPA,

*Secretary to Government,
Local and Legislative Departments.*

To—The Government Advocate in Mysore.
The Secretaries to Government.
The Deputy Commissioners of Districts.
The District Magistrates of Districts.
The Registrar, Chief Court.
The Heads of Departments.

EXD.—D. K. M.

O P I N I O N. *Re. Royalty.*

The question for consideration is whether the sum paid as royalty on Manganese ore is deductible under Section 10(2) of the Income-tax Regulation of 1923; in other words whether the company should not be assessed on a sum representing royalty or whether that sum should be deducted from the gross proceeds of their mines for the year in assessing income-tax.

The decision on this important question involves considerable amount of pecuniary loss or gain to Government in that the Kolar Gold Fields Mining Companies are deducting the sum paid as royalty from the total amount of sales of gold and the net value of gold is only taken for the purpose of income-tax; in other words, the Mining Companies are in the habit of not paying any income-tax at all upon the royalty on the ground that it is not included in the taxable income of the Companies. If the question is decided in favour of Government, the Government will be in a position to recover considerable sums as income-tax from the Mining Companies or individual miners working in Mysore. As the question is a very important one and as there is no decision in India it is essential to examine carefully the provisions of the English Income-tax Act^{and} of the Indian Acts with a view to find out exactly the principles that are applicable to the solution of this question.

The Indian Act generally follows the lines of the English Act and where the provisions are similar the English decisions are the best guides to their meaning and may be referred to with advantage (see Chief Commissioner of Income-tax VS. North Anantapur Mines Ltd., 921 I.L.R. 44, Madras 718.)

History of taxation in England particularly in respect of Mines.

Rating of real property in general and of Mines, quarries etc., in particular.

Before the introduction of Income-tax Acts into

England, parochial autho-

rities raised a revenue for parochial purposes which was however much in the nature of income and property tax and the scheme of English Income tax Act shows that the Legislature

followed the methods adopted by parochial authorities. The constant course followed from the statute of Elizabeth downwards is to treat coal Mines, quarries and the like as a species of property and the owner and the occupier thereof were rated for what they produced namely the coals etc., and that no allowance was made for the expenses of sinking or improving it to make it more productive just in the same manner as if a house is to be rated as soon as it is built and occupied. (See King VS. Atwood (1827) 6 B & C 277, 6 App. Cases page 340). The Chief Justice Abbot in the above case given the principles of rating coal mines His Lordship observes as follows:-

"We are all of opinion that the owner and occupier of a coal mine should be rated at such a sum as it would let for and no more i-e., coal mines were rated for what they produced namely, the coals,." He further stated as follows:-

But I cannot discover any distinction between expenses incurred in bringing a mine to a productive state and in building a house. The attempt to distinguish them is perfectly novel and if a house is to be rated as soon as it is built and occupied, it must follow that a coal mine is rateable as soon as it is set to work and produces coal, although it may happen that the expenses of sinking it up may never be recovered. If the tenant of a mine expends the money in making it more productive, that is the same as expending money in improving a farm or a house, in which cases the tenant is rateable for the improved value."

Lord Blackburn in approving of this statement of law observed as follows:-

"I do not say that what Lord Tenterden here lays down as to the taxing of a coal mine is necessarily either just or expedient. But though this case was decided before the earlier income-tax Act, it was an authoritative declaration to what had been held to be the law before, and must have been well known to that large proportion of the legislators who

habitually acted at quarter sessions.* (See Coltness Iron Company V. Black 6 App. Cases page 315 at pages 327 and 333).

No distinction is made for the purpose of Income-tax between a terminable interest such as that in a mine which must at some time be worked out and a fee simple interest -- which will endure so long as this World continues in its present state. The policy of the Income-tax Act is to tax the income arising from property or business from whatever source income has been derived. In assessing the annual value of any property for income-tax the value recorded by local authorities are even now looked at by the Income-tax officers. As Lord Blackburn shows there is a connection between the principles of assessment for poor rate and for income-tax. From the course of history of taxation of mines it is clear that the mine is treated as a species of real property, deriving its annual value from being auxiliary to trade and that by the act of 39 Victoria Chapter 36 the mines were assessed under Schedule ^A as heritable subjects which were taxed on the annual value and the duty shall be charged and assessed according to the rules prescribed by Schedule D of the said Act so far as such rules are not inconsistent with the said Rule No. III. The mineral licences were considered as really a sale out and out of a portion of the land and any royalty paid upon it is a consideration therefore and the rent reserved on a mineral lease was like royalty, taxable in England from the earliest times.

Under the settled land Acts a part of the rent derived from mining leases is applied as capital money unless a ~~contrary~~ contrary intention is expressed in the settlement

(See 1924 Paton Law Reports page 234 at page 237 Supp. to C.W.

History of Income tax
Acts in England.

From the settled scheme of Income-tax it is made abundantly clear that the annual value of the property is to be ascertained in the same manner as the local authorities did for levying taxes. For income-tax purposes it is ascertained without making any deduction except

those mentioned in the Act. The profits or gains of any business has acquired a technical meaning for the purpose of income-tax. The sense of the word profit as used in political economy is not the sense in which it is applied in dealing with income-tax Acts. Lord Penance in the Coltness case (6 App. Cases page 323) observed that the contention that the profits derived out of the mines cannot be ascertained until a certain portion of the cost of making it productive were deducted cannot be upheld. His Lordship's judgment has almost become a classical one on the subject of profit as applied to Income-tax etc. I make no apology for quoting it in full. His Lordship observed:--

"In a general and perhaps a strict and logical sense, I think this is true. But it is also, and equally true, I think that the cost of the mineral strata themselves, whether they have been hired or bought, should be included in any calculation which had for its object the ascertainment of the actual profit obtained by the Company out of the entire adventure, so much for the prime cost of the mineral bed, so much for apparatus approaches to it in the shape of pits, so much for working it and getting the mineral to the surface, so much for getting the mineral to the market, and against all these the price -- obtained for the mineral sold there would be the elements of a profit and loss account of the entire adventure of this tenure. But is this the sense in which the word "profit" is used in the Act? I think not.

The intention of the Act, it is abundantly clear was in Schedule A to tax "property". If a man had bought an estate, the tax was intended to be paid by him on the annual value of that estate, without reference to where he got it, or how he got it, or how much he paid for it. So if a man built a house or bought a house, he was intended to pay tax on the annual value of the house, no matter what it cost. Nor does any thing turn upon the fact that the estate is a permanent and undecaying species of property, while the house is a species of property of a less durable kind; he was intended to pay tax upon

upon it as long as it lasted.

What then, is the case of a mine? In this Schedule, A which is the schedule applicable to "property" a "mine" is in express terms included as a species of "property" and is made the subject of a tax. The only question is, how small the annual value of this species of perty be ascertained? It is to this object that Rule No. III in Section 60 of the Act is addressed. That rule assumes the ownership of the "mine" passes by altogether the sum of money which it may have cost, either in the way of purchase or rent, and proceeds to describe the method of calculating its "annual value" to the owners thereof, and this it declares shall be the average "profit" over a period of five years, "received" therefrom". The words "profits" received therefrom are here introduced to define the annual value of the thing which is to be taxed which is the "mine" and it could not, I think be intended that for the purpose of calculating the "annual value" of a mine" the original cost of the mine itself, or any part of it should be first deducted. On the contrary the words "profits received therefrom" in this connection mean, I think, the entire profit derived from the "mine" deducting the cost of working it, but not deducting the cost of making it."

The present English
law on the sub-
ject.

Mines are classed as property
which appear to fall on the border
line of the exceptions to the

general rule made by the rules grouped under Rule III and treated as property from which a concern is carried on for the purpose of actual profit. The principle underlying the grouping of mines under Schedule A No. III which relates to real property and the application of rules under Schedule D, which relates to trades etc., and which are not inconsis-

inconsistent with Rule No. III is explained as follows:--

"The principle is reasonably clear, and it is that in the case of Iron Works and other works enumerated which are carried on with a view to profit, it is impossible, or at least extremely difficult to separate a profit derived from the use of the land, from the profit derived, from the mercantile undertaking carried on by means of the land or its produce and therefore the two things are massed together and are assessed as a going concern. (See Lord MacLarin in *Harries VS. Edinburgh Corporation* 1907 S.C. 1233; 5 T.A.X.C. 271 on page 277, See *Konatom* page 39).

The rule is in the case of mines of coal and other mines, the assessment shall be charged on the annual value which is understood to be the average amount for one year of the profits of the 5 preceding years. In rules framed for ascertaining the annual value, the 5th rule is to the following effect.

"Tax shall be assessed and charged on the acquisition of the produce of the concern, before any distribution to any person entitled to any share thereof or to the owner of the soil or property, or to any creditor or other person whatever, who has a claim on the profits and every such person shall allow, out of the produce or value of proportionate deduction of the tax charged."

In rules under Schedule D allowing deductions in computing the mines of the profits or gains to be charged we find that no sum shall be deducted in respect of a disbursement or expenses not being money - wholly and exclusively allowed or expended for the purposes of profession, employment or vacation &c., and in respect of any royalty or other sum paid in respect of the user of a patent. From this it is clear that the royalty which is paid to the owner of the soil or property is covered by Rule 5 of Rule No. III of Schedule A and by analogy to clause 9 of Rules under Schedule D is not allowed to be deducted out of the gross receipts of profits of the miner.

Now the question is whether this principle of English Law is applicable to India Law.

The Mysore Income Tax Act is based upon the - Indian Income Tax Act and hence the principles applicable Principles underlying $\left\{ \begin{array}{l} \text{to the Indian Income Tax Act and the} \\ \text{Indian Income Tax Act.} \end{array} \right\}$ authorities based upon it will equally apply to Mysore Income Tax Act. Sections 9 and 10 of the Indian Income Tax Act of 1922 relate to taxation of property and - business respectively. Section 9 corresponds to Schedule A of English Income Tax Act of 1918 and section 10 corresponds to Schedule D of the same Act. It has been - shown above that the occupier of the mine has been taxed both under schedule A and D of the English Act. Both on principle and authority it appears to me, that the the owner of a mine is to be taxed under Sections 9 and

10 of the Act as it is the case in England. I venture to submit this opinion on the following grounds:-

(1) In the words of Lord Cairns in *Gowen V Christie* L.R.2. H.L.S.C., on page 284 "that Nature of mining leases. | a lease of mines 'is not in reality a lease at all in the sense in which we speak of an agricultural lease. There is no fruit, that is to say, there is no sowing and reaping in the ordinary sense of the term, and there are no periodical harvests, what we call a mineral lease is really, when properly considered, a sale out and out of a portion of the land."

This statement has been characterised by Lord Blackburn in *6 A.C.* at page 335 "as a perfectly accurate statement."

In *Sri Sri Rajasiva V the Crown* 1924 Patna Reports Supplement to Calcutta Weekly Notes, 234, and at page 231 Dawson Millers C.J. observes:-

Royalties paid to the lesser although they may be regarded in one sense as - Royalties and rent are charged to Income Tax under English Law as income in the hands of a land-lord. | instalments of the purchase-price of the minerals forming part of the land are treated in England as income and have been so treated in this Court. (see in the matter of *Raja Jyoti Prasad Singh Deo (5)-*). They are none the less income merely because they are paid for rights the exercise of which involves a waste of the capital. As was pointed out by Lord Halsbury, L.C. in the Secretary of State for India V. Sir Andrew Scoble (6), where you are dealing with income tax upon a rent derived from coal (and the same would apply to royalties) you are in truth taxing that which is capital in this sense that it is a purchase of the coal and not a mere rent, but he adds; the incometax is not and cannot be. I suppose from the nature of things, cast upon absolutely logical lines."

2. Rent reserved in a mineral lease is treated as

taxable income (6 A.C. page 335).

3. The owner of the mine is really carrying on a going concern and derives profit from the use of the land and also from the merchantile undertaking carried on by means of the land or its produce. It is difficult to separate the profits thus derived from land and trade and the two things are mixed up together. Hence it is the English Law taxes any person possessing interest in the property and also a person carrying on business is charged the income tax on the average income derived from both the sources. In this connection it is important to note that in section 9 of the British Act, the word 'property' has been substituted in the Act of 1922 for the expression "house property" in the old Act, thus making it applicable to vacant lands. Hence the income or profit of a miner should, I think, be charged under section 9 and 10 of the Indian Income Tax Act.

Meaning of the expressions
'property' profits, gains,
or income'.

Turning now to the meaning to be attached to the expressions used in the sections, for the question for consideration entirely depends upon the interpretations to be put upon the words 'property, profits or gains or income' as used in the sections.

There is authority for the proposition that the expression 'property, profits or gains or income' as used in section 9 and 10 bear the same sense as they bear in English Income Tax^{Act} for the lines on which the Indian Income Tax Act are based are similar to those of English Act.

The income tax is the Crown's share of profits for the protection it affords to trade and commerce, thus enabling the profits to be made. (see Ashton V.A.T. Gen. (1906) A.C. 12 and Johnston V. Chestergate - 1915 2 Chancery 338.

The word, 'profits' does not correspond with 'profits' in the popular or colloquial sense, so is the

word 'income'. The standard fixed for assessing property under schedule A is the annual value derived from property.

In the case of business the tax is a tax on income.

Scheme of English Income Tax is the same as Indian Income tax.

"Whatever may be standard -
measure of income. It is a tax
on profits or gains." In the
case of duties chargeable under schedule A and every
thing ~~under~~ coming under ^{that} (schedule, viz., annual value
of lands capable of actual occupation as well as the
earnings of the Railway Companies and other concerns
connected with land, just as much as it is in the case
of other schedules of charge. It is to be observed
that the expression 'profits' or 'gains' which occur
so often in the Income Tax Act is constantly applied
without distinction to subjects of charge under all the
schedules. (per Lord Mac Naghton in London County Coun-
cil v. Attorney General - 1901 A.C.26 which contains the
classic statements of the nature of the tax).

The words 'income, profits, gains' are used in a technical sense in the Indian Income Tax Act, just as it is in English Act. 'Income' means periodical - (usually annually) receipts received from such business lands, work, investments, etc. (Per Wallis C.J. in 44 Madras 65 at page 68 and 60 Indian case 357).

'Profits' and 'Gains' - Both ~~mean~~ these words have been held to mean to be receipts. (See 44 Madras-70 to 71, 24 Bombay Law Reporter - p.118). 'Profits' of a trade or business means the surplus by which the receipts from trade or business exceeds the expenditure necessary for the purpose of earning those receipts.

(Per Lord Harschall in Russel's case -1888,

13 A. C. 428
1906A.C. 12
1912A.C. 443
1915A.C. 458
1921-2 A.C. page 30.)

There is no distinction between the words 'profits'

and 'gains' (8 A.C. 891). The words imply a comparison between the state of business of two specific dates usually separated by an interval of an year. The fundamental meaning is the amount of gain made by the business during the year. (Per Fletcher Moulton L.J. in re. Spanish Prospecting Co. 1911 1 Chancery p.92).

Having shown that the mine owner is to be taxed under those sections, I think the more convenient method of proceeding is to examine the known terms of the sections to find out the exact meaning of the expression 'bona-fide' annual value of property as used in section 9 and in respect of the profits or gains of any business as used in section 10. Annual value has been described as the amount of profit derived from the property by the landlord as such. (see Edmonds v. Eastwood - 1858-27 Law Journal Exch. 209). But for income tax purposes the actual value is ascertained without making any deduction for repairs, insurance or renewals. It occurs in various Municipal Acts and decisions thereon are usually referred to for there is a connection between the principles of assessment for poor rate and for income tax, as shown by Lord Blackburn in Coltness's case 6 A.C. at page 330 to 334.

In section 10 the language used is that the tax shall be payable in respect of the profits or gains of any business carried on by him. The tax is to be upon the profits and it is to be charged upon every individual or company carrying on the concern and on the amount of the profits or gains of any business. Now if we had nothing more than that, it is to be thought that we were to consider not the application of the money which the company received when they have received them but the profits of the concern in the sense of the produce or value, which would properly be described as profit of the concern, and that surely would be all the net proceeds of the

concern, after deducting the necessary out-goings without which these profits could not be earned or received. But the Act allows certain deductions both in sections 9 and 10 and states definitely that the annual value or the profits ought to be computed after making these deductions. Therefore so far as these words go, they distinctly exclude from deduction; as regards the question of priority over the tax payable to the Crown, all payments to any other person whatever having a claim on or out of the said profits, or the owner of the soil or property. That proves distinctly that the word profit here used does mean the incomings of the concern after deducting the expenses of earning and obtaining them, before you come to an application of them, even to the payment of persons having a claim over the concern. The wording of the section 10 shows that in these cases the company is to be charged upon its entire net receipts for the purpose of duty, excluding the allowances mentioned in the section and to ~~discharge~~ disregard every application which may have to be made, whether in favour of creditors or sellers of the concern, of any part of those receipts. (See the Judt. of Lord Selborne in *Mersey Dock's* case 8 A.C. at pages 903 and 904).

The instructions issued by the authority by ~~the~~ of Government of India (Vide Income Tax Manual) under the Head 'Business deductions' (Para 36) show clearly that assessment is to be made upon the gross receipts of the profits minus the deductions allowed, and that ^{no} ~~exh~~/allowances are permissible under the head 'bad-debts, expenditure of the nature of charity or of the nature of capital incurred for extensions or of any other taxes except local rates and municipal taxes, salaries of the proprietor, interests on the partners' capital, private personal expenses, rental value of the property owned and

Instructions of Government of India.

occupied by the owner of the business for the purpose of business, etc. This clearly indicates that what is paid to Government as royalty which is the same thing as rent for the use of the mine, is not to be deducted from gross receipts. This is similar to English Law. (Vide R.4 of Schedule A, No.(3) as noted above).

Hence it is clear that from the plain meaning of sections 9 and 10 of the Indian Income Tax Act and from the instructions issued by Government of India, royalty cannot be excluded from the net proceeds of the mine, i.e., from the profits of the concern.

This discussion naturally leads one to the consideration of the nature of rents and royalties paid to

Nature of royalties with special reference to prospecting licenses and Mining leases in Mysore.

Government by the miners in Mysore. All minerals are vested in Government (Vide Section 38 of and Revenue

Regulation IV). This right has been parted with to persons who wish to prospect for minerals in the State. Under the rules in force a prospecting license is first granted in form No.4 given at page 27 of the rules. The first convenient in that is to the effect that the Government grant to the licensee, licenses and liberty to prospect for minerals and carry away, as and far his own use any or all of the minerals &c., subject to the payment of royalties specified in schedule hereto annexed. In the mining leases in form No.6 conditions 5 and to 9 show that the lessee should have and hold the premises on paying an annual rent, local cesses, taxes or rates, royalty and dead rent. Under clause 17 the lessee has to pay all these liabilities when they respectively become payable. Schedule A contains important provisions relating to the rate of royalty and the mode of payment. The rate of royalty shall be 5 per cent on the sale value of the gold and silver. The 'net profit' have been defined to mean the excess of the revenue which is wholly derived from the sale of the minerals or --

minerals specified over expenditure after all costs and expenses chargeable to the working and management of the mines shall have been included. But neither depreciation amortization nor Director's fees nor any revenue or expenditure obtained or incurred on account of share or capital transactions or by trade shall be brought into account, provided that the fees of such Director or Directors as may actually direct technical operations and are specially denoted as Managing Director or Directors may be included in the expenditure "Divisible profits" shall be declared dividends and bonuses or other payments made out of net profits to or on behalf of the share-holders and interest on debentures.

Hence it is clear from the contract between the mine owners and the Government that the royalty is the purchase price for the rights acquired by the licensees or lessees as the case may be, and that it is to be paid at stated intervals. The wording in schedule B is to the effect that the royalty is to be paid on all ores despatched. It will be a liability coming into existence after the miner has incurred the expenditure and removed the ore and not either at the time of working or before the ore is despatched to the buyer. Royalty in its literal sense means the share to which the Crown is entitled for the minerals extracted. It strictly represents the sum to be paid for the use of the mineral to which the Government are entitled. It is analogous to the interest on the partners' capital which under para 36 of the Income Tax Manual is not deductible.

Having dealt with the nature of the royalty, I shall now examine the contention raised on the other

Distinction between capital expenditure and current or revenue expenditure.

side that the royalty may be treated as an expenditure (not being in the nature of capital expenditure)

incurred solely for the purpose of earning such profits or gains within the meaning of ~~earning such~~

Clause IX of section 10. This clause is similar to Rule 3 Clause (a) of Schedule D. Rule 3 (a) is as follows:-

"Any disbursements or expenses not being wholly and exclusively allowed out of or expended for the purpose of the trade profession employment or vacation."

Though the language is different the effect of this rule is similar to rule enacted in section 10 (2) IX of the Indian Act. The decisions on English Law will have therefore apt application to section 10 (2) (ix) in other words these decisions will illustrate fully the meaning of this rule in Indian Act. It is a fundamental principle of English Law that in computing profits for income tax purposes no deduction is allowed for capital expenditure (see Konstom Page 84). The same principle is followed in Indian Law which is as follows:-

"Expenditure of the nature of capital not permissible to be deducted." (Income Tax Manual pages 88 and 89). The capital expenditure comprises all expenditure incurred in acquiring assets for the purposes of earning income, or increasing the earning capacity of the business; for example, land and buildings and additions thereto patent or mining rights and machinery or additions thereto. Revenue expenditure may be said to consist of expenditure incurred in replacements, repairs, renewals, depreciation of the fixed assets and also the current expenses of carrying on the business, such as rent, rates and taxes, wages and salaries, carriage insurance and other trade charges. (see Carters Advanced Accounts page 348.

These terms are sometimes denoted by fixed capital and circulating capital. The Capital or fixed capital and circulating or current capital.

fixed capital of a company and circulating capital of a company has been defined for the purposes of income tax in many of the decided cases in England. The fixed capital of a company is what the company retains in the shape of assets upon which the subscribed capital has been expended and which assets either themselves produce income independent of any further action of the company or being retained by the company are made use of to produce income profits or gains, while a circulating capital is a portion of the subscribed capital intended to be used by being temporarily parted with and circulated in business in the form of using goods or other assets, which or the proceeds of which are intended to return to the company with an increment and to be used again and again and always return with accretions. When circulating capital is expended in buying raw materials from which goods are manufactured and sold at a profit the amount so expended must be charged or deducted or receipts before the amount of any profit can be considered (Per Swinfen Eady L.J. in Ammonia Soda Company v Chamberlain (1918) 1 Ch. 267).

goods which are
sold at a profit or
in buying

As observed by Farewell L.J., in Stevens v Hudson's Bay Co., (1909) 5 Tax Cas 424 "It is well settled - that income not capital, is taxable under the Income Tax Acts and that income is so taxable notwithstanding that on an adjustment of accounts part of the sums accruing as income ought to go to recoup capital; - income is not the less income for the purposes of

income tax, because it is produced by embarking - capital in a wasting subject matter (e.g., in buying and working mines) nor on the other hand, does an annual sum become ^{income} merely because it is paid annually.

The important distinction between the fixed capital and circulating capital is that money spent for acquiring the assets will not be returned to the company during the course of its operation, while circulating capital is intended to return to the company with an increment. Tested in the light of these cases it is clear that the royalty which is paid for acquiring the rights of minerals which are the assets of the company are to be paid at stated intervals and never come back to the company and which are paid for retaining the assets which naturally fall under fixed capital. (Coltness Iron Company v Black 1881 6 A.C.315 and Usher's Wiltshire Brewery Company v Bruce 1915 A.C.433 are the leading cases on the subject of capital expenditure and expenditure solely incurred for business respectively. Whether a particular item of expenditure falls within capital or current expenditure is a question of fact for the commissioner to decide. (see Moore v Stewart and Lloyds (1906, 43 sec.L.R.811; Smith v Lion Brewery Co.,(Ltd.,) 1911) A.C.150 at pp. 156-7; Smith v Council of Law - Reporting (1914) 3 K.B. 674).

Examples of capital expenditure. The payment forming part of the consideration - for the transfer of business is a capital expenditure (see 1897 A.C.1).
The purchase

considered capital expenditure (See *Delage v Nugget* 1905 92 L.T.682. The cost of acquiring a right to a patent with a view to working it is in the nature of capital expenditure (See 1905 2 K.P.507) *Brighton Coal Company v Kirpatrick* 1894 14 Q.B.D.491 is an important case. This case affords the principle of finding out profits in a mining concern. The profits are defined at page 496. This case decides the principle that where a dead rent and royalties which were payable with a clause providing for no greater sum than the dead rent should be paid in any year until the amount previously paid as dead rent should be recouped out of royalties; no deduction could be claimed by the lessees for the excess (over the dead rent, of royalties which would have been paid but for this clause, but which though in fact retained to recoup themselves for payment to dead rents made before they begin to work the minerals. It also decides that the sum represented by dead rent itself and the excess sum that would have been payable but for that clause both form part of the profits. It is observed as follows:-

"The duty (income-tax) therefore becomes due to the crown as soon as lessees have determined the profits for the particular year irrespective of any sums they may have paid to the owner of the soil or property (*Ibid* page 497). Gross receipts from sales of patent machines are included in the total income. (See *John's case* 1920 1 K.B.711) There is therefore no doubt whatever that royalty is included in the profits made by the miner for the year. The royalty though payable in instalments does not become less capital expenditure when it is considered it is purchase price of the rights (See *Kenston* page 161.)

Meaning of clause
of Sec.10 Sub
sec.2 of the Indian
Act.

Turning now to the exact meaning of clause (13) of Section 10(2), it will be seen that it has been interpreted in English Act that expenses in order to be deductible in ascertaining profits must be essential to the

earnings of the gross receipts and must be incurred for that purpose. "It is not enough that the disbursement is made in the course of or arises out of, or is connected with the trade or is made out of the profits of the trade". (See *Strong vs. Woodfield* 1906 A.C.448 per Lord Devey at page 453.)

As already observed the profits as used in the Income-tax Act are the incomes of the concern after deducting the expenses of earnings and obtaining them, before you come to an application of them (Z.A.C. pages 903 and 905). The deductions given for the expenditure incurred solely for the purpose of earnings profits of the business are based on the equitable principle that as the crown shares in the profits of a trader it should allow him to deduct the ordinary and reasonable costs which he incurs to earn those profits and without which they could not be earned. It follows therefore that the expenditure incurred in earning profits are confined to expenses incurred in respect of a current expenditure and not those expenses which come out of the profits after they are earned. The Indian decision reported in 60 Indian cases page 360 is to the same effect as English decision on the interpretation of the term expenditure incurred solely for the purpose of earning income. (Dunlop J page 361 Col.2 observed that the royalty is part of the profits of the mine.

Conclusion.

From the history of taxation in England it is clear that the mines were rated at their annual production just as if they were house property even before the introduction of Income-tax acts into England and that in calculating the annual value of a mine, the original cost of the mine i.e., either the purchase money or rent or any sum spent in improving it to bring it to a productive stage was not deducted. The present law on the subject is to the effect that the annual value of a mine shall be understood to be the average amount for one year of the profits of the preceding five years, that the tax shall be charged on the

value of the produce of the concern before any distribution to any person including the owner of the soil or property etc., is made; and that no other deductions except those mentioned in rules under ~~Sub~~ Schedule D are made out of the gross receipts.

Indian Law.

Since the scheme of Indian Act is exactly similar to English law, it is clear that from the language used in sections 9 and 10 of the Act the same conclusion is deducible, as it is in English law that the nature of royalty as can be seen from the covenants of the prospecting licences and mining leases in Mysore is such as to indicate that it is a part of purchase price for securing valuable mining rights which are the assets of the company and that it is incurred as capital expenditure and as such not covered by Clause 1X of Section 10 Sub Section 2 of the Indian Act which is similar to Mysore Act.

Hence I am of opinion that the sum representing royalty is included in the profits of a minor and as such cannot be deducted for income-tax purposes.

(57) *Steyffe*

What is the money wholly and exclusively laid out for purposes of trade not being the nature of capital expenditure is a question which must be determined on principles of ordinary commercial trading. It is necessary accordingly to attend to the true nature of the expenditure and to ask one-self the question - Is it a part of the Company's working expenses? - Is it expenditure laid out as a part of the process of profit earning or on the other hand is it a capital outlay? Is it an expenditure necessary for the acquisition of property or rights of a permanent character, the possession of which is a condition of carrying on trade at? As it is pointed out by Lord Davey in the case of *Strong vs. Woodfield* L.R.1906 A.C. page 448, it is not enough that the disbursement is made in the course of or is connected with the trade or made out of the profits of the trade, it must be made for the purpose of earning the profits. Though the proposition stated in general terms looks easy enough, what is capital and what is attributable to revenue account in a puzzling question to many accountants and it is not possible to lay down any satisfactory definition. Without attempting to lay down a rigid test one may take it that what is expended for the acquisition of an asset or for some permanent expansion of the business is a capital expenditure (see the interesting discussion in *Atherston vs. British Insulated Hebbay Cables Ltd.* a decision of the English Court of Appeal of November 1924 against the decision of *Rowlatt* J-1924 W.N. page 233.) If a person lays out a large sum of money in the purchase of business and then works the business for a certain number of years he is not entitled to deduct that purchase money in computing his annual profits nor is he entitled to distribute the purchase money pro-rate and claim a pro rate deduction. It may be that as a result of such a computation a man may pay income-tax for a series of years and at the end find that he has not recouped himself even the capital. The sale of the entire business stock at the end of the

period may not fetch him anything like the -capital sunk and yet the statute gives no relief to him. If a mining lease is in the nature of a sale for a term as Lord Cairns puts it, it is certainly arguable that the royalty is the price paid for it though it is not a sum certain. The sale consideration may take any form. It does not matter whether the money is payable by instalments. *Foley- Vs.- Fletcher*, 3 H and N page 669- 157 English Reports page 678. Nothing turns on the form of consideration. It matters not whether the consideration is paid in money or money's worth. (vide L.R.6 A.C. page 355 L.R.1897 A.C. page 1, L.R.1905(2), K.B. page 413).

There is nothing extraordinary in the contention that royalty is not a permissible deduction. Clause (m) of Rule 3 of Rules applicable to cases I and II of schedule D of English Income-tax Act 1918 expressly provides that a royalty or other sum paid in respect of the user of a patent is not a permissible deduction. I do not see any intrinsic difference between a royalty paid in respect of the user of a patent and a royalty paid for the working of a mine for the purposes of income-tax.

The question as to whether a particular expenditure is a capital expenditure or not has come before courts in connection with mining concern though not in connection with payment of royalty. In *Mc Adam Vs. Knowles*, L.R.Ex.D.page 23- 1.I.¹.C. page 167 the extreme view was taken that the whole of the mining operations must be treated as akin to buying and selling of stock and that every expense incurred is in the nature of a purchase account and the expense therefore necessarily - enters into the profit and loss statement. This view ~~was~~ was expressly dissented from in the House of Lords in *Coltress Iron Company vs. Black* 6 A.C. page 323 where it was held that a tenant of minerals though he might be under a constant vanishing expense in sinking new pits as the old ones become exhausted is not entitled in computing the profits for assessment of incometax to deduct

from the gross profits a sum estimated as representing the amount of capital expended in making bores and in sinking pits which was exhausted in the years' working. Lord Blackburn's judgment in that case proceeds to some extent upon the history of the English Incometax Act and upon a mining concern being chargeable under schedule A. But the reasoning of the House is equally applicable even if the charging is to be technically under schedule D and not under schedule A read in the light of schedule D. The Lord President in the course of his judgment in the Court of appeal which was affirmed by the House of Lords points out that the proposed deduction stands on the same footing as the attempt of the purchaser of a lease to deduct from the income arising from the subject - purchased a proportion year by year of the purchase money. Lord Penzance says that in the case of a mine which is taxed under Schedule A you are not entitled to deduct any sum of money which it may cost either in the way of purchase or of rent. He says that the assessable profit as a result of the combined operation of schedules A and B is the entire profit derived from the mine deducting the cost of working it but not deducting the cost of making it. Lord Blackburn says that the effect of upholding the contention would be that though the mines were worked so as to produce a profit above the working expenses yet if they were worked by a purchaser who ever estimated the value of the minerals and paid such a price for them that he was a loser no incometax was to be paid for the use of the mines. That is a result which would never have been intended by the legislature. In another portion of the judgement, His Lordship quotes with approval the dictum of Lord Cairns in L.R.2 Scotch Appeals page 273 that the so called lease of a mine is not a lease at all but is in the nature of a sale for a term.

Lord Cairns makes a point of the fact that the expenses of the pit sinking relates to a previous year but the reasoning of the other Law Lords in the case is equally applicable to the expenses incurred in the year of assessment.

In a recent case decided by the Court of Session in Scotland the facts were these:-- Under the terms of a mineral lease a Colliery Company was obliged to restore to an arable state all ground occupied by it or damaged by its workings, or, as its option, to pay the lessor for all such ground not so restored, at the rate of 30 years' purchase of the agricultural value thereof. In the exercise of its option the Company paid the lessor a sum of £6,104/- as representing the value of the damaged land. Their Lordships hold that the expenditure was merely incurred for the acquisition of an asset of the firm and was in the nature of a capital expenditure.

In the light of these cases, I think that the Estate can certainly prove the contention that the payment of royalty is the consideration for the acquisition of an asset- viz., the mining concern - and that it is therefore in the nature of capital expenditure.

Apart from the question whether payment of a royalty is a capital expenditure within the meaning of the clause or not, the Government may also raise the contention that the payment is one made for the preservation of the asset and is therefore not a sum expended wholly for the purpose of acquiring profits (vide L.N.1923 A.C. page 145). Under the terms of the license the Estate has a right of entry if the licensee does not pay the royalty and therefore the sum may be aptly described to be one for the preservation of the concern itself to the licensee.

There is only one aspect of the case which I should like to consider before I conclude. - an aspect which is likely to be pressed by the other side. The other side may argue that if royalty is to be treated as something in the nature of capital expenditure because it partakes of the nature of consideration for the acquisition of the assets, it ought to partake of that character in the hands of the vendor or lessor and yet the view has been taken that it is in the nature of income in the hands of the vendor or licensor (vide I.L.J. XXIV (21. page 257)). In XXIV Cal. 257 Mr. Justice Mukherjee while conceding that there is a good deal of force in the argument that royalty is really in the nature of price paid for a portion of the soil, the payment whereof is distributed over a number of years and is akin to invested capital reconverted into money (3 H and C page 769 = English Reports 257 page 678 and 1903 A.C. page 299) and that a mineral lease when properly considered is in reality a sale out and out of a portion of the land comes however to the conclusion that having regard to the decisions in 10 C.B. page 176 and 6 H and C page 277 and the definition of 'income' in the Oxford Dictionary that in its essence royalty must be treated as rent from the point of view of the lessor and as such assessable to income-tax under the head of income from 'property'. Referring to the dictum of Lord Cairns in L.R. 2. Scotch Appeals that a lease of mine is in reality a sale, he says, that the dictum ought not to receive a logical extension by treating royalty as purchase money in the hands of the licensor or lessor and consoles himself with the dictum of Lord Salisbury in Quinn vs. Leathern that law is not necessarily a logical code.

Under the English law as I have already stated the point is not of any practical importance because the entire profits including the royalty deducting only the working expenses is

assessed to income-tax in the hands of the licensee. The rule of course deals with a case where a lessor is a private owner.

The English cases where in consideration of a transfer an annuity is secured to a transferee, an annuity is treated as income either in the hands of the transferor or by the transferee, being permitted to deduct the tax on the annuity, need not detain us. For, in my view they have no relevance to the question under consideration in as much as they are based on the express language of Schedule D which provides in terms that an annuity shall be treated as income for purpose of income-tax. The English decisions and the dicta on the subject are conflicting on the one hand it has been held that where a gross sum is fixed as a consideration and the same is distributed in instalments or money's worth in the shape of a recurring liability the sum payable is not taxable as annuity, (vide 3 H. and L. page 769, 1907 (1) T.R. 494, 1903 A.C. 292 History of Annuities in 1901 A.C. page 26, 1905 (2) A.C. 423). On the other hand, if a gross sum is not in terms fixed under the terms of a transfer and a certain periodical sum or percentage is payable every year to the transferor, though it may be for a fixed number of years, the sums payable are treated as annuities assessable to income-tax with a right in the transferee to deduct the income-tax thereon (Vide rule 21 of all Schedule rules of the English Income-tax Act 1918). The English cases are all classified in a recent decision of Lord Atkin in 1923 (1) A.C. 393. As I have already ~~observed~~ observed, the question before us is not whether a periodical payment is subjected to taxation at one stage or the other but whether the periodical payment is a permissible deduction in the computation of profits. On this point, the English cases are absolutely of no assistance even if they are to be treated as laying down a general principle and are not to be treated as authorities merely on the interpretation of the sections of the English Income-tax Act.

O P I N I O N.

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The point raised by Mr. Nagappa is one of great importance and complexity. Over a matter of such importance, I should have taken much time in any case. The fact that the practice hitherto followed is different from that which Mr. Nagappa insists on as the proper interpretation of the Income-tax Regulation has added to my anxiety to look into the matter from all possible points of view. The Regulation furnishes so little guidance in arriving at a solution that one does not feel absolutely certain of the correctness of the solution when reached. This is uncertainty necessitates a full statement of the pros and cons on the matter.

The question raised by Mr. Nagappa may be shortly formulated in the following words:--

Has Income-tax to be paid under the Mysore Regulation on the "income" of the mines after deducting the royalty payable to the Mysore State or has it to be paid on the "income" without deducting it?

The case for deduction may be stated in the form of three propositions:

(1) The profits of a mine on which income tax should be levied ought to be made up only after allowing a deduction for royalty.

(2) Royalty is one of the deductions which the Mysore Regulation specifically permits even if the calculation of profits does not otherwise involve the deduction.

(3) If the Company paid income-tax on the income of the mines without deducting the royalty payable to the State, it is entitled to deduct proportionate income-tax from the royalty and pay the balance to the State and claim complete acquittance for the full royalty.

I may explain this threefold contention in this way. If the very meaning of the word "profits" (which must mean the difference between gross receipts and legitimate outgoings) involve the ~~inclusion~~ inclusion of royalty among the outgoings~~///~~ and the consequent deduction of it from the gross receipts, a Regulation which imposes

a tax on profits cannot involve the levy of income tax on income without deduction of royalty. In this view it is no argument to say that royalty

-----)	as a deduction is not mentioned in the
F.13 A.C.418 at 424-5	
(1892) a.c. 309 at p.316	) Regulation as one of the deduction to be
(1915) a.c.433 at p.458	)
(1912) a.c. 118	) allowed. It may be asked and justly
(1921) 2.a.c. at p.31.	)
-----)	asked why should it specify itf by the

very use of the word "profits" you have already authorised the deduction.

If the first point is decided in favour of the State (that is to say if the word "profits" does not involve the deduction of royalty) the attempt of the company will be to bring royalty under one or other clause in the Regulation authorising deduction in the calculation of profits.

Even if these two arguments failed, the company will still attain its object if it can successfully claim to deduct from the royalty payable to the State a proportionate share in the income-tax; for, what the company pays as additional income-tax on the undeducted royalty, it will take back as a permissible deduction in paying the royalty.

Mr. Nagappa's treatment of the question gives detailed consideration to the first two points, but has not dealt with the third.

These questions have to be solved on the language and provisions of the Mysore Income-tax Regulation of 1923. The Regulation is the same as the Income-tax Act in British India *mutatis mutandis* and the Law may be taken to be the same in Mysore and in British India. There is no doubt ~~that~~ that the underlying ideas of income-tax are derived from and ultimately traceable to the English law of income-tax and the English decisions may be referred to in deciding questions connected with income-tax in India. But it requires care and discrimination to use them legitimately and within proper limits. The Indian Acts have not adopted all the provisions of the English Statute and one cannot proceed on any general assumption that the Mysore Regulation is intended to reproduce the English Law in every respect. The English Law of Income-tax has a long and ~~peculiar~~ history behind it and the English Statute has its root in that history and except where the language of the Regulation is the same as or similar to that of the English Statutes or the matter under consideration turns on general principles applicable alike to the Mysore and the English Law, the English decisions cannot be followed as infallible guide. With this caution I will proceed to the consideration of the subject.

The Indian Law does not group the subject of taxation in the same way as the English Law though the Indian Legislature had the English Statutes before them. Section 6 of the Indian Act divides the subject of taxation under six heads and the mode of calculating the taxable income in respect of those cases is given in Sections 7 to 12. Only two of them can possibly apply to the case of a Mining income and they are "property" and "Business" dealt with in sections 9 and 10, and the question is, under which of these these two categories is a mine to be brought. Mr. Nagappa is of opinion that it comes under both Sections. I am doubtful if the Indian Act intends to bring an income under two sections. Even in England it is not correct to say that one source of income falls under two heads. It seems to me impossible to bring this case under section 9 dealing with "Property". It is true that the expression "House Property" which occurred in the previous Act is replaced by the word "Property". But even so, a mine is not intended to be brought under it. The change was made for the purpose of bringing properties like a ~~xx~~ godown or business premises within the section. The express "house property" will be ordinarily understood to include property used for residential purposes and may not include a godown or ~~xx~~ business premises. As it was the intention of the Legislature to make these other properties also taxable on their annual income, the general word "property" was substituted for the expression "House property". That property like a mine was not intended to be brought under section 9 by the use of the generic word "property" is made amply clear by its provisions. Tax is payable under Section on the "annual value" of property consisting of any building or land appurtenant thereto and the annual value is defined as the sum for which the property might reasonably be expected to let from year to year. It provides for repairs when the owner occupies the property or the tenant does so. It provides for deduction of collection charges. It provides for deduction as to vacancies. All these provisions unmistakably indicate that it relates to what may be roughly described as house property or buildings occupied for residential or other purposes. The profits of a mine become taxable only under

See 67.
Indian
Cases
78.

Section 10 whether it is the owner himself or the lessee that works the mine. I may say the rules under the Indian Act proceed on the footing

-----	}	that this species of property
Rule 8 of the Income-tax ~~Act~~		
Rules British India.		
-----	)	falls under section 10.

Mr. Nagappa's desire to bring the property both under sections 9 and 10 is due to the way in which a mine is dealt with under the English Law. A mine is property though a peculiar one ~~in~~ in the mode of its enjoyment. It is owned just like house property. It may be occupied by the owner or by a lessee under him. When a house property is occupied by the owner he makes no income out of it. But when he lets it and his tenant occupies it he makes an income but the occupier does not. When the owner occupies it, the income is fixed with reference to what it would fetch if it were let. When we turn to property in a mine its treatment is wholly different. It is worked with mechanical accessories and labour and the mineral is won and sold and profit arises. If the owner does not work the mine, he is not charged on any hypothetical income. If he does work it, he is charged on the income he makes. If he lets it to another for working the lessee of the mines makes the profit unlike the tenant of a house and is the person to be charged on the income derived. The owner of the mine may be paid a lump sum or a variable royalty and may be charged income-tax if and in so far as his receipt is in the nature of income, the lease of the mine being charged at the same time on the income of the mine. The peculiar nature of a mine as property and the mode of deriving benefit from it makes it resemble a business more nearly than property. This double aspect of a mine as property and as a business is recognised in the English which classifies mine as property under Schedule A and makes it taxable on what is called annual value which in the case of a mine is directed to be taken as the average annual profit derived from the property. Its classification is under property but the mode of calculating its "annual value" is to find out its profits as in the case of a business under schedule B without forgetting that it is property under Schedule A.

38 Cal.
372 p.c.

The difference between mine as a business and other business-like dealings in particular commodities involves a difference in the mode of calculating the profits. A mine being property it is to be taxed irrespective of the cost to the owner of the mine. As a house is taxed

on its annual value without reference to the price for which was it purchased or the amount invested in its repair or improvement; so has a mine to be taxed on its annual value without reference to any outgoing in the shape of interests on the capital outlay in the acquisition of the mine. If we take other ~~businesses~~ businesses in commodities, the amount expended in the purchase of the commodity is taken into consideration in arriving at the profits on which the owner of the business is taxable. It is the difference between the sale price and the cost price of a commodity that constitutes the profit in such a business. If the same principle were applicable to a mine in the hands of a lessee, his profits must be the price of the ore in its finished form minus what it has cost him to get it. The royalty paid to the lessor of the mine would appear on one side of the account among the items that make up the cost price of the ore and the profit would be calculated by deducting the total cost from the price of the ore. That this mode of calculating profit on ordinary commercial principles is not the method to be adopted in the case of a mining business is stated in 6 Appeal Cases. All this distinction between mining and other business is intended to be given effect to by the peculiar arrangement of the schedules under the English Law, the mine being put under the A Schedule, but taxable income being calculated on profits.

Taking therefore that the liability of a mine to income tax falls to be decided under Section 10, how are the profits to be calculated. Can Royalty be deducted from the receipts before the profits are arrived at.

Before dealing with this question, let me state the nature of a mining lease and of the royalty paid for it.

A mining lease is not a lease in the real sense

of the term. It is not a lease in the sense in which we may speak of an agricultural lease, there is no fruit, there is no sowing and reaping and there are no periodical harvests. A mineral lease is really when properly considered a sale out and out of a portion of land. That being the ~~nature~~ nature of a mining lease it may be asked, what is the nature of the consideration paid for acquiring a mine under a mining lease. It is in one sense true that what is paid to the owner by the lessee of the mine is the price for the purchase of what is described as a portion of the land. It may be that what is paid for such a purchase if it is a definite ascertained sum of money will be treated as price and as capital expenditure not to be treated as income derived from the mine. If the definite ascertained sum of money undertaken to be paid for such a transfer is spread over a period of ~~x~~ years in the shape of annual instalments, it is still the price for what is a sale of a portion of land and to be viewed as capital and not as income. A mine may be sold not for an ascertained price paid either in lump or in instalments, but for an annuity, in that case the annuity may be the price paid but it is for the purposes of income tax income not capital in the hands of the receiver, though the distinction between the price paid in instalments and an annuity may be very fine. Royalty payable for the lease of a mine gives rise to no such difficulty. It is not an ascertained price paid in lump or in instalments. It is a share of the income varying with the quantity of minerals won or a dead rent in addition to the share of the income. In every such case it is viewed as coming out of the profits of the mine. This was what Lord Penzance meant in 6 Appeal cases when he said "The argument that no income tax should be imposed on what is perhaps not accurately called rent reserved in a mineral lease because it is a payment by instalments of the price of minerals forming part of the land any more than on the price paid down in one sum for the out and out ~~xxxx~~ purchase of the minerals forming part of the land is I think untenable."

L.R.2.H.
L.284.

1903 A.C
299.

2 H & N
769

(1905)
2 K.B.
507
& (1920)
1 K.B.
711.

34. C.257
at 283-6.

Another point ~~which~~ which I may advert to before coming back to the mode of calculating the profits is whether royalty can be said to be rent. The passage in 6 Appeal Cases above cited expressed the opinion that royalty is not rent, On the other hand it is stated in some cases that the distinction between royalty and rent is a difference in nomenclature and not in essence. Royalty is a share of the substance of the soil removed by the person who pays the royalty. Rent is what is paid for the use of the land in which no abstraction of its substance is involved. The decision very pertinently asks, whether in agriculture an abstraction of the substance of the land is not really involved. The decisions do not speak with one voice on ~~this~~ this matter. It is not perhaps quite necessary to decide it finally in the view I take of the matter.

Sec. 34 C.347
per Mookherjee
J.
109 B. 178--
116 E.R. 69

2. H & N. 811
157 E.R. 334 at
336-7.

Now turning to the mode of calculating the profits I am in agreement with Mr. Nagappa. The question is whether the Indian Acts by classifying the mining business along with other businesses under Section 10 intend that the same mode of calculating profits should be applicable to all of them. That is to say, have we under the Indian Law to calculate the profits of a mine as in the case of a trade in commodities, by taking the cost price and deducting it from the receipts on sale and arriving at the true commercial profit which

is the basis of taxation in the case of all other businesses. I think that such a course does not follow merely from the classification of mining business under section 10. The character of a mine as property is a fact which is not abolished by the classification and the consequence which flows from that fact must remain ~~non~~ notwithstanding that the Legislature has laid stress on its business aspect as the more important one and so classed it among businesses. Consideration paid for a mine like the consideration paid for a house is investment of money on the acquisition of property and unlike the purchase of a commodity does not enter into the calculation of taxable income. The acquisition of a mine cannot be treated as purchasing the product of a mine and selling it in the market for a profit.

I cannot bring myself to believe that if the Indian Law intended to alter the mode of calculating the profits of a mine which is well established in England, it would not have made express provision for calculating profit differently. Moreover, such a view will involve many consequences which are negatived by decisions in India. If royalty were viewed as the price for the acquisition of the minerals as commodities, it will not be liable to taxation in the hands of the person who receives it, but that is certainly not law in India.

54 Cal.
257.

The word "profit" must have the same signification under the English and the Indian Acts in the absence

of any indication to the contrary. Under the English Law, the annual profit of a mine is the excess over --- expenditure of income derived from working the mine -- and winning the minerals from it. The deduction from gross income indicated by the words "legitimate working expenditure" it is embodied in section 10 clause 9 "any expenditure not being in the nature of capital expenditure incurred solely for the purpose of earning such profits or gains" and the corresponding rule of English Law uses the words "any disbursements or expenses not being money wholly and exclusively laid out or expended for the purpose of the trade". The words "solely" in the one case and "Wholly and exclusively" in the other make it clear that royalty is not an expenditure which can be brought under the rule. It

(1911) a.c.150 may be added that a payment which has to be made out of
(1914) 3 K.B. 674 the profits cannot constitute an expenditure for the purpose of earning that from which it is itself derived. Much
(1906) a.c.448 24 BomL.R. 118. less can it be said to be an expenditure solely or wholly
(1915) 338 and exclusively for the purpose of earning the profits.
1906 A.C.p.10 at P.12

Thus, notwithstanding the indefiniteness of the --
38 col 372 P.C. at p. 376. language of the Indian Statutes, in the absence of any -
express method of calculating the profits, it would be difficult to maintain that royalty as a deduction is either involved in the very conception of profits or is specifically permitted by the list of permissible deductions given in section 10.

The only question that remains for consideration is whether the mine owner who has paid the income tax on the profits inclusive of royalty is entitled to deduct income tax proportionate to the royalty before paying it to the person entitled. This has not been considered in Mr. Nagappa's opinion. Under the English Law it is clear that when the occupier of the mines has paid the income tax on the profits as defined above, he is entitled to deduct proportionate income

income tax from the amounts payable as dividends, from royalty or other amounts payable to owners.

It is in this matter that the difference between the English Law and the Indian Law arises by reason of the difference in the language and provisions of the enactments applicable to the two countries. Under the English Law it is provided that when the occupier of the mines has paid the income tax on the full amount of profits as defined above (that is, on the receipts from the mine minus the amount of legitimate working expenditure) he is entitled to deduct the proportionate income tax from the amounts payable to other persons. Rule No. 5 of schedule A-No. III runs as follows:-

" Tax shall be assessed and charged on the value of the produce of the concern, before any distribution to any person entitled to any share thereof, or to the owner of the soil or property, or to any creditor or other person whatever who has a claim on the profits, and every such person shall out of the produce or value allow a proportionate deduction of the tax charged".

And General Rules No. 23 says:-

- "1. A person who refuses to allow a deduction of tax authorised by this Act to be made of any amount; shall forfeit the sum of £ 50/-
2. Every agreement for payment of interest rent or other annual payment in full without allowing any such deduction shall be void".

The result of these two rules is that the rule of deduction is absolute and no contract can control it. A decision has gone the length of holding that the deduction may be made even where the persons to whom the amount was payable was entitled to an exemption from tax.

When we turn to the Indian Acts, there is a total absence of any provision for deductions of proportionate income tax from the amount payable to the owner of the mine such as royalty or rent. Section 18 authorises a deduction of income tax from "salaries and interest on securities". The income tax so deducted and paid is

is deemed to have been paid on behalf of the person from whose income it is paid. Except in these two cases, the receiver of the income is liable to pay the tax direct (see section 19). Section 20 authorises the payment of income tax on the profits by Companies and section 45 provides a corresponding refund to the receivers of the dividend. Royalty is not a payment in respect of which a deduction of tax is permitted and section 19 shows that the receiver of royalty if a private person will be liable to be assessed. Further every person deducting, retaining or paying any tax in pursuance of this Act in respect of income belonging to another person is hereby indemnified for the deduction etc., " (Section 65). This would apply only to a case of a deduction permitted by the Act and a deduction in respect of royalty is not such an one.

The result is that the lessees of the mine must pay income tax on the profits without deducting royalty and the receiver of royalty must pay the income tax on the amount of royalty as being his income. That is not a case of double taxation as it is not the same person that pays the two -- taxes (see 14 Q.B.D. at page 498 and 60 Indian Cases 357 per Bucknill J). If the receiver of royalty is exempt from taxation by reason of the fact that the receiver is the -- State itself, that can confer no benefit on the lessee and involves no immunity to him from paying the royalty in full.

The position of the Mysore State in regard to mines on agricultural land does not affect the above conclusion but might possibly improve it. Having stipulated for specified royalty, it is entitled to receive it without deduction, it is entitled to receive it without deduction. If it is an ascertained sum it must be paid. If it is an ascertainable sum it is in exactly the same position.

(Sd/-) Venkataramana Sastri
 Adv. General
 Madras.

The two questions arise for consideration:-

Firstly whether the reservation of certain kind of materials, to wit, Manganese ore can be made by Government throughout the State.

Secondly, whether a concession can be given to United Steel Company, i.e., a preferential treatment for the grant of a prospecting license, etc., over an area comprised within a circle having within its centre Ayanur and a radius of 13 miles round it i.e., in other words whether a monopoly can be created by which that company will have exclusive right for prospecting for manganese ore and exporting the same from Mysore Province in exclusion of all other persons.

The solution of these questions involves the consideration of law regarding monopolies and of the constitutional powers of the sovereign, or the State to grant such monopolies. It may be useful to examine the law on the subject as obtaining in England, America and British India. Such an examination will throw considerable light in solving these questions.

What is monopoly?

Monopoly means an exclusive privilege or possession or assumption of anything to the exclusion of other possessors. It is described as a power granted to any person or persons, bodies politic or corporate, for sole buying, selling, making, working or using of anything, whereby any person or persons, bodies politic or corporate are

sought

sought to be restrained of any freedom or liberty that they had before or hindered in their lawful trade (See Coke 3 Inst.181).

The essential ingredients of a monopoly is that all or nearly all articles of trade or commerce within a country or district is brought within the hands of one man or one set of men as to practically bring the handling or production of the commodity or thing within such single control to the exclusion of competition or free traffic therein, in other words, a monopoly as understood in law is an exclusive right granted to a few, of something which was before of common right. (per Mr.Justice Story in Charles River -- Bridge V Warren Bridge 11 Pet. 36 U.S.420 607 8 L.Edn.773. See on Monopolies p.9.).

English law

Monopoly is always considered as one which prevented free competition and is generally void at common law. The theory of English common law has always been that every individual must be left absolutely free to carry on what calling he likes, and to develop whatever sort of skill may be adequate to such calling. He must be able to earn an honest living by any lawful employment and for that purpose he must be left perfectly free. Monopolies have been denounced on the ground that these are calculated to raise the price of a commodity in respect of which the monopoly is enjoyed. Secondly, after monopoly is once granted there is a tendency for the commodity to go down in quality, for, the patentee having the sole trade regards only his private benefit and not the common weal.

Thirdly, it throws honest and independent workmen out of employment and tends to the impoverishment of diverse artificers and -- others who before, by the labour of their hands in their art or trade, had maintained themselves and their families who now will, of necessity, be constrained to live in idleness and beggary. On these grounds it was held in the famous case of Darcy V Allein (Co. 84) that the grant of letters patent to trade exclusively in all playing cards was held utterly void as being a monopoly and against the common law and diverse Acts of Parliament.

"It is now agreed that nothing can exclude a subject from trade but an Act of Parliament." ZBac.Abr.Vol.V.under head of -- monopolies.)

* Common law rule in re:
contracts in restraint
of trade.

The principle of common law is that contracts in restraint of trade are against public policy and are void. The principle on which this rule is based is stated thus:-

"The general principles on which contracts in restraint of trade have been held to be in contravention of public policy and, in consequence, void, is that it is the duty of the law-making power to secure to every citizen, the right to pursue his ordinary avocation and to dispose of his labour, or the product thereof, without restraint and to protect the public from the evil consequences of an agreement under which it would be deprived of the benefits of competition in skilled labour. The law has regard, on the one hand, to the interests of the person restrained from labour or trade, protecting him from oppression or from the con-

consequences of an injudicious bargain, and on the other hand, it takes account of the interest of the community in providing that it shall not be deprived of the benefit of his business or exposed to the burden of his support, as a result of his lack of employment."

The English Courts have often struggled to bring about a reconciliation between the two apparently conflicting principles.. One is that the public have an interest in every person's carrying on his trade freely; every person has got a freedom of making any contract. The law is the protector of freedom both of contract and of trade and that it has to adjust the bounds of each. Agreements entered into which place restraint upon trade were generally held to be bad but some exceptions have been engrafted to this rules.

The Present Law.

The present law as stated by Lord Macnaghten in Nordenfelt case (1894) A.C.535 is as follows:-

" The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade -- freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification and indeed it is

the

the only justification: if the restriction is reasonable, that is in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose -- favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities". This view is confirmed by House of Lords in Herbert Morris case (1916 A.C.p.688; in Mason's case (1913) A.C.724 and in Hepworth's case (1920) 1 Ch.D.1. the same view was taken.

It may be, and probably is, that jurisprudence has reflected the evolution of economic thought by accentuating at one period, freedom of trade, at another, freedom of contract; but the stage of balance and reconciliation which has ~~now~~ now been reached is, in truth a reversion and reinstatement of perennial problem, set forth in the penetrating judgment of Lord Macceffield in Mitchael V Reynolds i.e., 1 P. Wms. 181 and 189) decided 2 centuries ago.

Abuse of monopolies and exceptions to common law.

The grant of special patents of monopoly by the Crown originally instituted as a method of encouragement of new industries and large enterprises such as glass and steel, became greatly abused and all monopolies were decried in the sixteenth century. This led to the passing of the Statute of Monopolies. The effect of that is that in England no monopoly can now be granted except by an Act of Parliament. Patents, copyrights and trademarks are now governed by the Acts of Parliament.

These were originally treated as exceptions to common law.

American Law.

In America the tendency of the legislature as well as the Courts of Justice has been to uphold the stringent restrictions of the common law of England and to put down with a firm hand any effort to create a monopoly. The courts there held "any combination the tendency of which is to prevent competition in its broad and general sense, and to control and thus enhance the prices to the detriment of the public in a legal monopoly. (See *People V North River Sugar Refining Co.*, 1889 I.L.R.A. 3342 Sen p.406). The trusts, combinations, kartells, etc. have all been put down in America. The Shirman's Act of 1890 as it is called was passed to protect trade and commerce against unlawful restraint in trade and monopolies.

Indian Law.

Turning now to India, the law is contained in Sections 23 and 27 of the Contract Act. It is unfortunate that Section 27 of the Indian Contract Act is taken verbatim from New York Draft Code Section 833. This Section was introduced in America at a time when the cry of freedom raised with the Declaration of Independence rang in all departments of life and activity in America. The curious result is that the Indian law reflects the strict narrow view of the common law. As shown above the rigour of the common law is to some extent softened, while the strict letter of the Indian law does not admit even of partial restraint of trade. In no case was the question as to legality of contracts in restraint of trade under Indian

law was fully and thoroughly discussed as in Shaik Allu V Rameswaran Bhawath 9 Cal. Law Journal p.216. Mukherji examined the law on the subject in India and held that "an agreement by a manufacturer of a certain place with a person of another place, under which the former agreed to supply the latter with combs and not to sell the same to any one else is void, as it restricts liberty of doing business."

The learned judge further held that "the restraint from exercising lawful profession trade or business did not mean absolute restrictions and are needed to apply to partial restrictions, a restriction limited to some particular case. Contracts which impose an unreasonable restraint upon the exercise of a business, trade or profession are void but contracts in reasonable restraint thereof are valid; whether the limits prescribed in the contract are reasonable or not, depends on the kind of business to protect which the contract is made, and the reasonableness of the restraint imposed must be ascertained in every case by a reference to the nature of the business in question and to the situation of the parties. The question of the reasonableness of the restriction is one of law for the court. The learned judge approved of the rule that agreements tending to create a monopoly is against the public policy as its effect would be to deprive the public of the advantages which flow from free competition. He generally approved of the American law as to monopolies. He has reviewed all the Indian law on the subject and shown that the spirit of American law has a direct bearing upon the Indian law. In Somu Pillai V the Municipal Council, Mayavaram

Mayavaram (XXVIII Mad.p.520) the Madras High Court held that agreements having for their object the creation of monopolies are void as opposed to public policy under the English common law and under Section 23 of the Indian contract Act. They held that a Chairman of a Municipality has no power to grant a license to a person to have the monopoly of selling meat throughout the town. The learned judges of the Madras High Court have followed the general principles laid down in Logan v Pine 22, A.M.Rep. 261, which are as follows:--

"The power of Municipal Corporations is strictly confined within the limits prescribed by the statutes creating them and will not be extended by the Courts upon mere inference. It always depends upon express grant or must be necessarily implied as incident to other powers expressly granted or indispensable to the object and purpose for which the corporations were created. Doubts as to the existence of such powers must be resolved against the corporations and in favour of the public. A Municipal Corporation can grant, if at all, exclusive privileges for the protection of business which, without -- prohibitory legislation would be free to all men, only under express legislative grant of power. ~~Municipal~~ Monopolies being prejudicial to the public welfare, the Courts will not infer grants thereof, refusing to presume the existence of legislative intention in conflict with public policy."

Thus the Indian law is to the same effect

as the American and English law on the subject.

The result of case law
and the statutes.

To sum up (1) the monopolies however created have generally been regarded in modern time as opposed to the best interests of the whole people, depriving them, as it may, of the livelihood and enhancing as is its tendency, the prices they must pay. (2) In England nothing but an act of Parliament can enable the grant of monopolies at the present moment. (3) In America it is generally held that State Legislatures may grant exclusive franchise even despite of special constitutional provisions against deprivation of liberty and property, where this is shown in the particular case to be justified as a measure for the safety or interest of the public. (27 cyclopaedia of Law and procedure 892).

Hindu law towards monopolies.

Power of Kings in ancient India to regulate prices.

Any attempt on the part of traders to monopolise, i.e., to control the market for any given product and consequently to enhance its prices by combination amongst themselves was condemned by Hindu Law. That the Hindu kings had the power to regulate the prices of commodities, is conceded. (See Yegnavalkya Book II, verse 252 and Institute of Manu, Chap. VIII, verse 402.)

Monopolies in India.

In British India the following monopolies have been exercised:-

(1) Legal monopolies granted by the Statute such as patents and designs by the Act of 1911 copy rights by Indian Copy right Act III of 1914. The law relating to Trade mark and Trade names, regulates Trade marks &c.,

(2) Customary monopolies such as markets and fairs, docks and cranes.

(3) The Municipal monopolies granted by the Regulations

Excepting these, the principal monopolies in British India have been those exercised and maintained by the Government. Prominent monopolies among these are fiscal ones conducted with a view to revenue. Salt and opium occupy a conspicuous place. State monopoly in intoxicating liquors is essentially fiscal, although justifiable on other grounds as well. The case of Railways, Post and Telegraphs affords instances of State monopolies, ~~xxxxxxx~~ From the history of municipal and Government monopolies, it will be seen that some articles are placed under Government monopoly for augmenting the revenues of the State; that some monopolies are defended on moral grounds while others are on political grounds resting on public good and that a large class of municipal monopolies is based on public health, public safety and public utility (See 27 Cyc. 874 and 895).

The object of State monopolies.

Government monopolies are legalised by Regulations while municipal monopolies are granted by the Municipal Regulations.

As to mining concessions, I am only aware of some concessions given in the case of Ruby Mines of Upper Burma (See Sen on Monopolies p.17 (footnote)) Whether this is granted by any Act or Regulation is not clear.

From the above examination of the law on the subject it is clear that the sine qua non for the creation of any monopoly relating to

contracts in restraint of trade are, first, reasonableness in the right created i.e., covenant should be such as to protect the interest of both the Government and the party in whose favour it is created in other words the privilege should not be more than to afford a reasonable protection to the covenantee, and, secondly, that it should be reasonable in reference to the interests of the public.

"In every case in which it (the bargain exceeds that protection, the public interest which is always on the side of liberty, including the liberty to exercise one's powers or to earn a livelihood, stands invaded and can accordingly be invoked to justify the non-enforcement of the restraint." (Per Lord Shaw in *Mason's case* (1913 A.C. 724 at page 737)).

In the case of other monopolies, these are based either on fiscal grounds or on grounds of public safety.

Discussion of the two problems
now before Govt.

Turning now to the questions for consideration, two points arise.

One is the justification for such a monopoly and the powers of the sovereign to grant it. The Government are to be satisfied that either the revenue of the State would be ~~augent~~ augmented by the reservation of the manganese mineral to the State or that there is the existence of public interest demanding such a reservation. In other words, strong grounds should exist to suppress competition in manganese in

the State for an indefinite period. The mineral vests with Government and the Government are custodians of the ore. They are to use it for the best advantage to the public as well as to Government and that they cannot lightly interfere with the free trade of people. The question is whether the revenue to the State will not suffer by preventing individuals from freely dealing with the manganese ore. It is for the Government to consider in the light of law prevailing in other countries, whether the State will be justified in locking up its mineral resources and thus preventing free trade, and possibly losing revenue at a time ^{when} ~~under~~ there is demand for the ore.

^{to}
As/the second question it is clear that the proposed preferential treatment in favour of United Steel Co., seems to be unreasonable and opposed to the interest of the Republic. The main ground put forward in favour of the claim is that the company was the pioneer in the field and as such some protection had to be given to them.

It is to be remembered that the company is enjoying this protection since 1906, and that no one is allowed to prospect for the mineral in the preserved area. The reason for granting the privilege is that the company might take advantage of the privilege and vigorously prospect and obtain licenses to export the mineral. The Government did not intend that the mineral in the area should be preserved for the company without being dealt with. The

The company has taken full advantage of taking such of the blocks as they wanted for these 18 years and they have no right to complain that they have not been treated reasonably.

The effect of granting further privilege is that a large area where manganese ore is likely to be found will be reserved for the exclusive use of the company which will exclusively control the mineral and thus suppress competition. The question is whether such a monopoly can be granted.

As the right now claimed is not necessary for the protection of the interest of the company, it may ~~be~~ injurious to public interest as shown above. This aspect of the question may have to be considered before granting such a monopoly which may be clearly opposed to Sections 23 and 27 of the Contract Act.

As to the powers of the Government to create monopolies, I beg leave to submit the following for consideration of Govt. From the history of the monopolies, it is clear that the King in England cannot now create monopolies and that nothing but the Act of Parliament can do so. In America it is the legislature that can create franchises. In India all Govt. monopolies are legalized by Regulations. In Ancient India, Hindu sovereign had the right to control prices of food stuffs as shown above. No doubt the prerogative right of His Highness the Maharaja to

to make and pass Regulations is reserved by Section 16 of M.L.Regulation XIX of 1923. But it is doubted whether under the Hindu law, sovereigns have the prerogative right of creating monopolies such as those under consideration.

The Legislative Council seems to possess powers to make laws and Regulations on all matters except those mentioned in Section 9. Section 9 does not prevent Legislative Council from making laws and Regulations regarding monopolies. Hence it follows that the matter of creating monopolies i.e., granting exclusive privileges is within the cognizance of Legislative Council.

I, therefore, humbly venture to place this constitutional aspect of the question for ^{the} consideration of Government.

O P I N I O N. *on income-tax*
on Messrs John
Taylor & Co
.....

In my note of third July I stated as follows:--

" There is ^a difference between the Indian and English Law on the subject. There are several cases decided under the English statute on the question whether a non-resident foreigner exercised a trade within the United Kingdom or not, but under the Indian Income-tax act the only questions for determination are, whether any income has accrued from business connection or property under Clause (1) of Section 33 or from the business carried on under - - Clause (2) of that section" I have endeavoured in my former note to show that the decision of the Chief Court was erroneous on questions of law and that the Chief Court acted without jurisdiction in assuming facts which are not found by the Commissioner. The view that I entertain has found favour with the full Bench of Calcutta High Court of three Judges which ^{was} decided since I expressed my opinion. In Raj Urs Pratt Shellock Co., vs The Secretary of State for India in Council 40 Cal. Law Journal page 110, it was held that a certain company which was incorporated in the United States of America with its headquarters in the City of New York and which had a branch office in Calcutta to buy gum shellac and other Indian products, was held liable to pay income-tax and super-tax ~~though~~ though no sales were conducted in India by

the Company and that no part of the Company's income accrued, arose or was received in British India. This case is a stronger case than Messrs. John Taylor and Son's case under discussion.

The learned judges in the Calcutta case did not follow the case reported in 46 Madras, 360 and other English cases relied on by the Mysore Chief Court on the ground that Section 33(1) of the Indian Income-tax Act of 1918 is altogether different in its scope and in its object from section 31 of the Finance Act of 1915 and rules framed under Schedule D of the English Income-tax Acts 1842 and 1853.

I submit that the law enunciated by the full bench of Calcutta seems to me to be the correct interpretation of Section 33(1) of Act of 1918. My chief grounds are as follows:--

The English law relating to the taxing of profits made by the non-resident person in England may be stated as follows:--

The non-resident person is assessable in the name of, and for any profits arising to him directly or indirectly from an Agent factor &c. Rule 5 of general rules is to the effect that a non-resident foreigner is assessed in the ~~xxxxxx~~ name of his agent on the receipt of profits or gains by the factor &c. Under Schedule D, he is to be charged on the profits made by him in exercise of trade in the United Kingdom. The liability is imposed by Schedule D. The use of the words "from any trade exercised within the United Kingdom" in schedule D ~~xxx~~

shows that the condition precedent for making him chargeable is that a non-resident person should exercise a trade in the United Kingdom before he is liable to be taxed. The Finance Act and the rules framed under the general schedules are merely machinery and do not themselves impose the charge." (See Konstom page 127). The English cases proceed upon the expressed words of the statutes. The English Income-tax Act, as stated in my note above, proceeds upon the principle that the power of taxation of any state is of necessity limited to persons, property or business within its territorial jurisdiction. Upon this principle a non-resident person can only be made liable, if his income is derived from his ~~xxxx~~ ~~xxxxxxxxxxxx~~ property or exercise of ~~xxxx~~ trade within the United Kingdom. The English cases are decided upon this principle, but the Indian legislature has made a departure in this respect in the Act of 1918 and as such, the English decisions have no application to the facts arising in British India in this respect. The Indian Act of 1886 section 21 is as follows:--

"Any person not resident in British India whether a subject of Her Majesty or not, being in receipt, through an agent, of any income chargeable under Part IV, shall be chargeable under that Part in the name of the Agent in the manner and to the like amount as he would be chargeable if he were in British

India and in direct receipt of that income.

This is similar to rules framed under the English Acts of 1842 and 1853. The language used in the Indian Act VII of 1918 is totally different. Section 33(1) runs as follows:--

"In the case of any person residing out of British India, all profits or gains accruing or arising to such person, whether directly or indirectly, through or from any business connection in British India, shall be deemed to be income accruing or arising within British India, and shall be chargeable to income-tax in the name of the agent of any such person, and such agent shall be deemed to be for all the purposes of this Act the assessee in respect of such income-tax.

Provided that any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident person which are, or may at any time come, within British India."

The Mysore Act of 1923 closely follows the India Act of 1922 which is almost similar in this respect to Section 33(1) (Vide Section 42(1)). The India Acts of 1918 and 1922 show, that income though not arising in British India shall be deemed to be chargeable with tax (Vide Section 7 and 11 of Act XI of 1922 and Section 3(1) of Act VII of 1918). The English income-tax Acts lay down the territorial limit as shown above but the Indian Acts of 1918 and 1922 appear to have gone beyond that limit.

The difference between the English Act

and the Indian Act as appears in Section 33(1) is this:--

"In the Indian enactment the question where the trade is exercised does not come in at all for consideration. Under the English Act in the case of a non-resident a question would arise as to whether the profits or gains have arisen or accrued to him from any trade exercised within the United Kingdom. The expressions "trade exercised within the United Kingdom" are not to be found in the Indian Act and the India law does not proceed upon the basis of such a condition but upon the taxability of the income regarded from the point of view of the place where it accrues, arises, or is received or is deemed to accrue, arise or be received under the Act. In the English statute the place of residence of a person is a basis of assessment but not so in Act VII of 1918 under which the tax is leviable with reference to the place where the income accrues or arises or is received but not with reference to the residence of the person who is entitled to the income (See 43 Madras pages 8 and 82).

There is another fundamental difference noticeable between the two Acts. Section 33 of 1918 enacts a notional rule of law, the object aimed at being, that the owner of the income ~~should not~~ should not escape liability on the ground of his not being a resident in India provided he receives the benefit of transaction in

British India through somebody who represents him. This sanction introduces a fiction of law as regards the non-resident principal in order that income due to him may be regarded as accruing or arising in British India. The words "all profits &c.," shall be deemed to be income accruing or arising within Mysore are not to be found in similar English enactment. By introducing this fiction of law the Indian legislature appears to have gone beyond ~~the~~ territorial limit on which the English income-tax acts are based. Under the English law, the test is where does the company carry on business and not where the profits are derived (See 45 Bombay at page 1292). There is a broad distinction between trading with a country and carrying on trade within a country (See Per Lord Herschell in *Grainger & Son vs Gough* 1896 A.C. 325). In that case Lord Watson observed that there may be transactions by or on behalf of a foreign merchant in one country so intimately connected with his business abroad that without them it cannot be sufficiently carried on, which are nevertheless, insufficient to constitute an exercise of trade within that country within the meaning of Schedule D. His Lordship referred to the case of *Sully vs Attorney General* 1860 5 H & N 711 and observed as follows:--

"The learned judges recognise the principle that purchasing of stock in this country with a view of trading in it elsewhere does not of itself constitute the exercise of trade in the United Kingdom, when that department of the business from which profits

or gains are directly realised is carried on in another country." These observations indicate clearly that a company non-resident may derive profits in ~~xxxxxxx~~ respect of business in a country which does not necessarily amount to exercise of trade in that country and that such profits or gains may arise directly or indirectly. The English statutes by using the words "from any trade exercised within the United Kingdom" left such profits or gains free from income-tax. The Indian Acts using a different expression and introducing a fiction of law in Section 33(1) in their charging Sections included such profits or gains; for, by the terms of Section 33 (1) of Act VII of 1918 and Section 42(1) of Act XII of 1922 the profits and gains are to be deemed to have accrued or arisen in British India for the purpose of making the resident agent responsible for the tax. This difference in language has not been noticed by the Madras High Court in the case of the Board of Revenue vs the Madras Export Co., (1922 46 Madras 360) That there is now the substantial difference is clear as shown above which is not noticed by the Chief Court. All these aspects have been considered in the full Bench case of Calcutta in 40 C.L.J. Page 110.

Turning now to the application of Section 42(1) of Mysore Act of 1923, it remains for the Government to show that Messrs John Taylor & Sons have business connection within the Mysore Gold Mining Companies of which they are the managers and agents. Business connection means connection

a business. The word "business" is one of large and indefinite ~~importance~~ impart and cannotes something which occupies the attention and labour of a person for the purpose of profit. The word means almost anything which is occupation or a duty requiring the attention as distinguished from sport or pleasure and is used in the sense of an occupation continuously carried on for the purpose of profit. (See Smith vs Anderson 1880 15 Ch. Dn. page 247 at page 258) Roll vs Milner 1884 27 Ch. Dn. 71 at page 83 re: Marine Steam Turbine Co., 1920 1 K.B. 193. A concern by reason of which one can be said to have connection with such occupation is business connection (See 40 C.L.J. 110 at page 131).

Now it will not be difficult for the Government to prove that Messrs. Taylor & Sons have such business connection with all Gold Mining Companies, for, from the confidential enquiries made, it as ascertained that the members of the firm of John Taylor & Sons ~~periodically~~ periodically visit the mines and make a thorough inspection of all the mines and chiefly concern themselves with all matters relating to the efficient management of the mines and their engineering problems. They also have correspondence with Government and their departments on behalf of the companies of which they are the agents and managers. Nobody can think of saying that they visit the mines for pleasure or sport. The reasons that induced me to come to the conclusion that a review is to be ~~filed~~ still hold good.

For these reasons I am of opinion that
an application for review ought to be filed

(Sd) B.Nagappa,

6th December 1924.